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CASE AND COMMENT

CROWN PROCEEDINGS—POST OFFICE—STATUTORY UNDERTAKINGS

It may not seem logical that the Post Office should be liable for the negligence of its servants in relation to an inland registered postal packet, though not in relation to a registered packet destined to an address abroad. Nor may it appear to be sound sense that while the Post Office remains liable in respect of the inland registered packet, it should escape all liability in respect of the inland packet which is unregistered. These anomalies, however, are apparent on the face of section 9 of the Crown Proceedings Act, 1947; and the fact that the decision in *Treifus & Co., Ltd. v. Post Office* [1957] 3 W.L.R. 1 momentarily emphasises their existence should not preclude consideration of that case in the context of the wider question of the nature of the relationship between statutory undertakings and the public who utilise their services.

The plaintiffs, Treifus & Co., diamond merchants, registered two packets of diamonds, valued at £3,380 and £17,998 respectively, for transmission to New Zealand. While in the care of the Post Office the packets were stolen. The plaintiffs claimed damages from the Post Office both in contract, for breach of contract of carriage and bailment, and in tort, for negligence and a negligent system of working. The claim in tort was ultimately dropped in view of the provision in the Crown Proceedings Act, 1947, that, with the exception of actions relating to inland registered packets, "no proceedings in tort shall lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a servant or agent of the Crown." As to the claim in contract, the Court of Appeal held that there was, in the circumstances, no contract between the plaintiffs and the Post Office. In reaching this conclusion the court relied upon two

eighteenth-century cases, of 1701 and of 1778, which are, it appears, the only ones in which the question of the existence of a contract between the Post Office and those who post correspondence has been considered. The reasoning underlying the two earlier decisions, and now approved by the Court of Appeal, is that as the Post Office is a branch of the revenue, as it is a public service and as it is a monopoly, the relationship into which it enters with the individual must be treated as outside the sphere of contract.

There may be some disposition to question the validity of such reasons at a time when the revenue of the Post Office is applied to the carriage of mail, in much the same way as that of the Transport Commission is applied to the maintenance of the railways, and when the postal service is no less either a public service or a monopoly than are the nationalised gas and electricity undertakings. Greater weight should, therefore, perhaps be attached to those parts of the judgments in which reference is made to two other factors, namely, that, despite their age, no challenge has been offered to the earlier decisions in the intervening years and that, in enacting the various Post Office Acts which, together with Treasury Warrants and Post Office Regulations made under them, form a code governing the operation of the mail service, Parliament appears to have assumed, and to have proceeded on the basis, that the Post Office did not "contract" to carry mails.

It is, indeed, important that the case should be regarded as being no more than an interpretation of the Post Office Acts; otherwise it may be treated as having some direct application to the conditions governing the supply of other public services, such as gas, electricity, water and telephones. This might be retrogressive, for the classification of the relationship between the supplier and the consumer of these services can, in certain circumstances, become a matter of legal relevance. A contractual relationship, for example, opens up to the consumer a wider range both of substantive rights and of procedural remedies than would otherwise be available to him if he were left to rely upon breaches of statutory duty or the availability of mandamus. (See Street, *Governmental Liability* (1953), 108.)

The decision in the present case would not give cause for concern in this connection were it not for the suggestion made by Professor Street (*op. cit.*, 109) that, despite the different statutory bases for the provision of the various services, they should all be considered as fundamentally similar and as being contractual in nature. For if Professor Street is correct in the first part of his suggestion, then the decision in the present case might be interpreted as establishing a general rule that the provision of public services is

outside the sphere of contract; and should that be correct, then the force of this conclusion would be much weakened.

In the circumstances, there may be room for a reappraisal of Professor Street's suggestion along the line that the conditions under which the various public services are supplied do in fact vary and that a judicial authority which bears upon one type of service cannot be followed as an absolute guide to the conditions under which another public service is provided. Thus, on the one hand, the provisions of the telephone service is quite clearly non-contractual because the Telephone Regulations, 1951, provide explicitly that: "Nothing contained in . . . these regulations . . . shall constitute or lead to the formation of a contract between the Postmaster-General and any other person"; while, on the other hand, perusal of the Gas and Electricity Acts suggests strongly that the relation between the Area Boards and the consumer was intended to be contractual.

If this approach is pursued, it should be possible to regard *Treifus & Co., Ltd. v. Post Office* as no more than a decision which, while reflecting what may well be an archaic provision of the law, is nevertheless limited in its operation to the carriage of mail by the Post Office.

E. LAUTERPACHT.

CERTIORARI—ERROR OF LAW ON FACE OF RECORD—FINALITY CLAUSE

THE Court of Appeal in *R. v. Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574 held that the remedy by certiorari was available to quash a decision of a medical appeal tribunal for an error of law on the face of the record, notwithstanding that section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides that: ". . . any decision of a claim or question shall be final." The case is also of interest on account of the very strong expression of opinion by Romer L.J. in favour of the courts being the ultimate arbiters on questions of law which come before inferior tribunals.

The applicant, a colliery worker, had been injured in both eyes by lime in 1936. This had left him with only sufficient sight in one eye to continue his work. In 1955 both eyes were injured by fire while he was at work. As a result the left eye, upon which he had relied for so long, was rendered very much worse. The point of law on which the medical appeal tribunal was found to be in error related to the application of a regulation which deals with injury to one of two paired organs, such as eyes, legs, and hands.

The tribunal had failed to realise that once they had accepted aggravation to the left eye, they ought to have accepted the disablement not only for the left eye but also for the right eye which had been injured years before.

The applicant, after exhausting all the statutory ways of correcting the decision of the medical appeal tribunal, sought redress from the Queen's courts. The Ministry, when the application came on for hearing in the Court of Appeal, conceded that the decision was erroneous in point of law, but the court on its own motion reserved judgment on the question whether the tribunal's decision, expressed by statute to be final, could be quashed on an application for certiorari. This was a question which had not been discussed by the same court in *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, because it did not arise in that case. What, then, does a statutory provision that "any decision of a claim or question . . . shall be final" mean? Only that there shall be no further appeal. The formula does not exclude recourse to certiorari. It makes the decision final on the facts, but not final on the law whether the error in law be an excess of jurisdiction or a mistake on the face of the record. In *Gilmore's* case the error was in fact disclosed by the report of the specialist and not in the actual record of the decision.

The Report of the Committee on Administrative Tribunals and Enquiries states at para. 107: "It is now clear that the fact that the decision of the tribunal may be expressed in the statute as 'final' does not oust its (*i.e.*, the court's) jurisdiction"; and again, at para. 117, the recommendation is that no statute should contain words purporting to oust remedies by way of orders of certiorari, prohibition and mandamus. The Committee are evidently relying on *Gilmore's* case, in which Parker L.J. was a member of the court; he was also a member of the Committee. Both this case and the *Northumberland* case contain interesting material as to the development of certiorari. Prior to the enactment of the Summary Jurisdiction Acts in the last century, the court never doubted that language such as "final" and "without appeal" did not restrict or take away the right of the King's Bench to bring proceedings before itself by certiorari. The Summary Jurisdiction Act, 1948, by simplifying procedure, disarmed the exercise of certiorari as part of the supervisory jurisdiction of the High Court. Thereafter a record of a summary conviction no longer included any statement of the evidence and thus all opportunity of detecting an error to quash was removed: see *R. v. Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128.

The result is, perhaps, surprising because if the words "shall

be final" are simply to mean there shall be no further appeal, they are strictly unnecessary since appeal is invariably the creation of statute. Moreover, in some cases the expression is used in statutes when no rights of appeal are provided. It is, however, satisfactory to know that the law now is that finality in an administrative tribunal does not oust this jurisdiction of the High Court. Similar results have been reached both in Australia and Canada: see *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 147; *Re Brown and Brock and Rentals Administrator* [1945] 3 D.L.R. 342. In the latter case a statutory enactment had specifically taken away the right to certiorari, but this did not prevent the court from granting the writ to avoid a manifest defect of jurisdiction or manifest fraud.

E. C. S. WADE.

CONSTITUTION OF AUSTRALIA—SEPARATION OF POWERS—JUDICIAL
FUNCTION

ADMINISTRATIVE LAW—PRICE FIXING—RIGHT TO A HEARING

WHAT activities are judicial, what are "courts," and what are the indispensable qualities of judicial process, are questions which lie close to the heart of a lawyer's philosophy. Two recent cases from the antipodes are of great interest in this context, and although it is impossible to do them justice in a short note, their subject-matter can be briefly recorded.

The first is *Att.-Gen. for Australia v. The Queen and the Boilermakers' Society of Australia* [1957] A.C. 288—for short, the *Boilermakers' case*. In this the Judicial Committee of the Privy Council, upholding a bare majority of the High Court of Australia, performed a feat which even the Supreme Court of the United States might envy, for they invalidated Australia's industrial arbitration legislation, which had stood since 1904. The dispute arose out of two orders made by the Court of Conciliation and Arbitration, one calling on the Boilermakers' Society (a trade union) to discontinue a ban on work, and the other fining them £500 for failing to do so. This power to punish for disobedience was conferred by the Conciliation and Arbitration Act, 1904–1952, an Act of the Commonwealth Parliament, and £500 was the maximum fine. The Boilermakers' Society replied with a writ of prohibition attacking the jurisdiction of the Arbitration Court, and the dramatic success that they achieved is worthy to rank with the exploits of Sir Edward Coke.

The central point of attack was that the Australian constitution did not allow executive and judicial powers to be conferred upon

one and the same body. The Judicial Committee therefore had to launch into the very broad and important question whether the constitution was based upon a separation of powers as a matter of strict law. The High Court of Australia had held that it was, but only by a majority of four judges to three. In an opinion delivered by Viscount Simonds, the Judicial Committee upheld the majority against the Australian Government's appeal; the boiler-makers were not represented but (in the unaccustomed phrase of the report) "lodged a case." The crucial provisions were those of Chapter III of the Australian Constitution Act, 1900, beginning with section 71. This is headed "The Judicature" and states: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." (Section 61 correspondingly states: "The executive power of the Commonwealth is vested in the Queen. . . .") This is a formal separation of powers, and their Lordships looked no further for their conclusion that section 71 "negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond those limits." What then is a "court" within the meaning of the section? "It would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a court vest in it judicial power." As had been said by Barton J. thirty years previously: "Whether persons were judges, whether tribunals were courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name." A very similar point arose in South Africa in the *High Court* case (*Minister of the Interior v. Harris*, 1952 (4) S.A. 769) and even in England the question may have to be faced some day, for the Crown Proceedings Act, 1947, by section 2 (5) makes special provisions as to "responsibilities of a judicial nature," one of the few overt appearances of the separation of powers in an English statute. It is salutary to read the Judicial Committee's quotation from Evatt J. that "Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of judicial power but because of the elaborate provisions of Chapter III," and their quotation from Sir W. Harrison Moore saying that "between legislative and executive power on the one hand, and judicial power on the other, there is a great cleavage." It is possible that the attempts in 10 C.L.J. 216 and elsewhere to supply an analytical basis for this great cleavage are not so misguided as some people suppose.

By this broad reasoning their Lordships reached the conclusion that it was contrary to the design of the constitution for judicial and non-judicial powers to be united in the same body. Since the Court of Conciliation and Arbitration had extensive powers to settle industrial disputes by making awards as to hours of work, wages, etc., and these were indisputably functions of an executive character, it followed that its strictly judicial functions of determining legal disputes and meting out punishment involved just such an illegitimate union as the constitution did not admit. The writ of prohibition was accordingly granted, nor did their Lordships shrink from granting it because these two bad bedfellows had cohabited unblamed, or nearly unblamed, for so many years. The case is bound to be a great landmark in the constitutional law of the Commonwealth.

The other case, which comes from New Zealand, is *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal* [1957] N.Z.L.R. 167, a decision of the Court of Appeal in Wellington. This illuminates a subject of great concern to all countries which follow the common law: the right to a hearing of a person threatened with an exercise of administrative power. An inexplicable phenomenon of the post-war years in England has been the judicial tendency to abandon the doctrine of natural justice so firmly laid down in the past, that those who are to suffer by the exercise of statutory power have a legal right to be heard in their defence unless Parliament provides otherwise. See (1951) 67 L.Q.R. 103, (1954) 70 L.Q.R. 203, and 68 Harv.L.R. 569. But other countries of the Commonwealth have shown more concern for this particular tradition, and it is sometimes instructive to see how they extricate themselves from the meshes of the latter-day English decisions. Notable Commonwealth cases have been (among others) *New Zealand Dairy Board v. Okitu Co-operative Dairy Co., Ltd.* [1953] N.Z.L.R. 366, noted in [1954] C.L.J. 14 by a learned contributor who appeared as counsel in the present case, *L'Alliance des Professeurs Catholiques v. La Commission des Relations Ouvrières de la Province de Quebec* [1953] 4 D.L.R. 161, *The Queen v. Ngwevela*, 1954 (1) S.A. 123 and *Delta Properties Proprietary, Ltd. v. Brisbane City Council* (1956) 95 C.L.R. 11. The New Zealand cases, and not least the new one, are conspicuous for their full consideration of authority, and in this also they are in contrast with the home product.

The subject of dispute was the price of draught beer sold by the gallon under off-licence. Under the New Zealand Control of Prices Act, 1947, the Price Tribunal had in 1953 fixed the maximum price at 8s. 6d. a gallon after holding sittings in private, and after

dealing with applications by the plaintiff association about other grades of beer. The association, representing hotel-keepers who objected to the order, sought certiorari to quash it on the ground that they were first entitled to a hearing and had not been given one. The application succeeded on straightforward "*Electricity Commissioners*" grounds, *i.e.*, that the Tribunal was determining a question affecting the rights of subjects, and was also under a duty to act judicially. It followed that the common law rules of natural justice had to be observed, and the applicants were entitled to their hearing. Apart from this welcome adherence to the old rules, and the liberal interpretation given to "rights of subjects," what is striking about the case is the inclusion among "judicial" functions of something so closely akin to legislation as a price-fixing order. Between what is executive and what is legislative there is no clear dividing line, but what is "judicial" stands clearly apart from both—as witness the quotations in the Australian case, above. Yet the paradox is that "judicial" is also, as here, used in a special sense (often called quasi-judicial) to denominate *executive* acts to which the courts attach the borrowed element of judicial procedure requiring both sides to be heard. For *legislative* acts no such procedure is required, for the British Commonwealth has not yet followed the American Administrative Procedure Act, 1946, in giving a right of public hearing to interested parties as a preliminary to rule-making.

What swayed the Court of Appeal in New Zealand was the language of the Control of Prices Act. This constituted "a special Tribunal, to be known as the Price Tribunal," spoke of "cases" being "heard" before it, and gave power to summon witnesses and administer oaths. These judicial trappings seemed clearly to imply an adversary procedure with the customary rights for parties interested. It was a question of construction, and as Cooke J. said: "... a power may be of such a nature that it may, according to the circumstances that exist at the time of its exercise, sometimes be unaccompanied by any judicial duty and sometimes be exercisable only after the performance of such a duty." The nature of the power itself is, as the learned judge truly indicates, not an infallible guide, for all the powers here in question will be found to be either administrative or legislative (and no analysis can distinguish those sharply). No truly "judicial" power (in the sense used in the Australian Constitution) is in issue at all, and hence comes the terminological confusion which has infected the subject. The Court of Appeal of New Zealand have avoided these pitfalls with success, and their valuable exposition of the law shows a very laudable bias in favour of justice for the citizen. H. W. R. WADE.

RESTRICTIVE TRADE PRACTICES—RESALE PRICE MAINTENANCE—REGISTRATION OF AGREEMENTS

THE first reported decisions on the Restrictive Trade Practices Act, 1956, are *County Laboratories, Ltd. v. J. Mindel, Ltd.* [1957] Ch. 295 and *Re Austin Motor-Car Co., Ltd.'s Agreements* [1957] 3 W.L.R. 450. They are concerned respectively with Part II of the Act, which deals with resale price maintenance, and Part I, on restrictive agreements. Both afford excellent illustrations of old judicial attitudes dying hard in the face of new statutes; and the longevity of these common-law predispositions will be welcomed by those for whom section 25 of the Act, with which the *Mindel* case was concerned, is a disagreeable novelty. Part II of the Act prohibits "collective" resale price maintenance effected by means of agreements to withhold supplies, by trade courts, and the like (s. 24); but it then goes on to give new strength and scope to "individual" price maintenance conditions. Section 25 largely abrogates the principles apparent in such cases as *Taddy v. Sterious* [1904] 1 Ch. 354 and *Dunlop v. Selfridge* [1915] A.C. 847, by providing that where a supplier sells goods subject to a condition as to resale price, that condition (provided it is not otherwise void under Part I of the Act) may be enforced by him against any person not a party to the sale who subsequently, in the course of business and for the purposes of resale, acquires the goods "with notice of the condition, as if he had been a party thereto."

In the *Mindel* case, the plaintiffs manufactured pots of "Brylcreem" which were acquired from wholesalers by the defendants, and issued a price list, of which the defendants received a copy, stating the retail price at which the pots should be sold. But the defendants, who were cut-price traders, sold their pots at 4d. less than the list price, and they now argued that the plaintiffs' application for an injunction should fail because they had not had "notice" of the condition. They had been told nothing which brought to their attention the fact that these particular pots had been made and sold after the Act came into effect; the secret mark on them indicating date of manufacture meant nothing to them; therefore, even though they had received a price list after the Act was effective, they still had no notice of the condition as affecting the pots in question. Harman J. accepted the argument, and held that "notice" in section 25 means express knowledge: actual, not constructive notice. The trader is not put on inquiry. There was no evidence that the wholesaler had mentioned the matter to the defendants, who thus had no notice that "this particular jar of Brylcreem was sold subject to the condition." The circumstances of this case are not likely to recur; but the judgment shows how

narrowly the courts are prepared to construe such sections. "I observe," said Harman J., "that [section 25] is a section limiting the freedom of trade and, therefore, although I am bound to give it that effect which the language of it expresses, I am not prepared to go beyond that and stretch it so as to produce an effect which the express language does not warrant."

A not dissimilar approach can be seen in the *Austin* case, which concerned the construction of sections in Part I of the Act. Agreements to which this Part applies, that is to say, those under which restrictions relating to the wide variety of matters set out in section 6 (1) are accepted by the parties, must, if the Board of Trade has by Order brought the Act into effect in respect of the class of goods concerned, be registered with the Registrar, unless they, or restrictions in them, fall within the exceptions of section 7 and section 8. A registered agreement can be brought before the new Restrictive Practices Court by the Registrar, and to this court (which will consist of at least one judge and two laymen) is assigned the task of deciding whether the restrictions are contrary to the public interest and the agreements *pro tanto* void (s. 20). In reaching that decision, the court is guided by section 21, the core of the Act, which deems the restrictions to be contrary to the public interest unless the court is satisfied that they fall both within one of the seven specified formulae and within the "tail-piece" of the section. The seven formulae give the parties the opportunity to prove such defences as:—" (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial advantages enjoyed or likely to be enjoyed by them as such . . ."; " (e) that . . . the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment . . ." in the relevant area; and " (f) that . . . the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business . . ." of the trade concerned. The "tail-piece" demands that the court must be further satisfied that the restrictions are not "unreasonable" having regard to the balance between those seven circumstances and any detriment likely to result to the public. Even after the orgy of expert evidence which such deliberations may be expected to stimulate, satisfaction on these questions may not be easy to attain.

Things in the *Austin* case did not reach this stage. The applicants, Austins, applied for a declaration that two agreements made in 1957 between them and their distributors and dealers were not

registrable at all. Austins had for long organised a sales network, built in pyramid fashion in each area of the country, Austins supplying distributors, distributors selling to dealers, and dealers to retail dealers. All these persons entered into annual agreements with Austins, and the restrictions regularly contained in these agreements fell clearly within section 6 (1) of the Act. Many were multipartite agreements, but in 1956, because of the imminent statute, Austins inserted a new clause whereby bipartite contracts only were to be concluded in future. Pursuant to this, new agreements between Austins on one side, and distributor or dealer on the other, were entered into in 1957, establishing, as Upjohn J. found, effectually the same sales network as had existed previously, by means of slightly different formulae in bipartite agreements. Austins now argued that the new agreements were exempted from registration by the "sole agency" provisions of section 8 (3). This section exempts "any agreement for the supply of goods between two persons" (neither of whom is a trade association), to which no other person is party, and under which no restrictions within section 6 (1) are accepted "other than restrictions accepted (a) by the party supplying the goods, in respect of the supply of goods of the same description to other persons, or (b) by the party acquiring the goods, in respect of the sale or acquisition for sale of other goods of the same description." The Registrar conceded that the new agreements *prima facie* fell within that section, so that Upjohn J. was relieved of the task of interpreting the words "same description." (Similarly, the more obscure provisions of the similar section 7 (2), on which much judicial ingenuity is likely to be expended, did not on the facts arise for construction.) But the Registrar did argue that, if a new agreement was viewed in its setting, there could be inferred from it some acknowledgment of the other agreements. None of the parties would have accepted new agreements (which contained a very large number of restrictions) unless all the other Austin dealers were doing the same. These parallel agreements preserved intact the old sales network, and this, it was argued, amounted to a multipartite "arrangement" outside section 8 (3). That arrangement was registrable because "agreement" under the Act "includes any agreement or arrangement whether or not it is intended to be enforceable (apart from any provision of this Act) by legal proceedings" (s. 6 (3)).

Upjohn J. accepted fully the argument that the new organisation was substantially the same as the old; but he refused to infer from the new contracts any multipartite arrangement, even when they were seen in that setting. First, he refused to say that Austins

concluded each of the agreements as agents for the other dealers in the network. They were "not in any sense agents for their own dealers. Austins call the tune." (When the courts will imply an agency, as in *Pyrene Ltd. v. Scindia Steam Navigation Ltd.* [1954] 2 Q.B. 402, and when they will not, is not now easy to predict. A critic of the *Austin* case could fairly suggest that many a person who was in law a principal has had to dance, in fact, to the tune of his agent!) Secondly, he would not hold that a multipartite "arrangement" existed (whatever was the proper definition of that term) unless the three or more parties accepted "mutual rights and obligations." It was not "permissible in law" to spell out that nexus from documents which created bipartite agreements and "whose operation is clear and unambiguous" in that respect. He pointed out that the Solicitor-General might have argued that there existed a separate arrangement, "dark, secret and hidden . . . beyond and outside," and collateral to the agreements; but he had not done so. If he had, the matter would have been one not of construction but of evidence. No arrangement could be obtained by construction of the documents even in the light of the surrounding circumstances.

The *Austin* case must, therefore, be considered in the context of the finely circumscribed argument put forward on behalf of the Registrar. Even so, it is not without interest to note that, in the course of his judgment, Upjohn J. adverted to a tax case establishing that in one area of tax law there is no doctrine that the substance rather than the legal form of a transaction must be considered: *I. R. C. v. Duke of Westminster* [1936] A.C. 1; and see *I. R. C. v. Wesleyan Assurance Soc.* [1948] 1 All E.R. 555. But it may be asked whether the Restrictive Trade Practices Act does not require an approach less formalistic than that underlying the tax game between Revenue and draftsmen; in the construction of a statute explicitly concerned with the "public interest" it would not be surprising to discover an investigation of substance and the mischief to be avoided. If the allegation of a "secret" collateral arrangement had been made, his Lordship would have allowed Austins and the dealers "to bring evidence, if they so desired, to rebut such an inference" of an arrangement. It cannot be said that "such an inference," which would then apparently have had to be *rebutted*, differs in substance from that which Upjohn J. was invited to draw by the argument actually presented to him.

Certainly, the horizontal and vertical scheme imposed by Austins throughout this section of the trade can be easily distinguished from the individual and vertical agreements exempted by section 8

(3) and sections 7 (2) and 24 (3), or even from a series of such agreements. Even in the tax cases "arrangements" have been speedily inferred from parallel activities: *cf. I. R. C. v. Clarkson Webb* [1933] 1 K.B. 507. In section 6 (3) the word "arrangement" must, if it is to have any force, mean something different from an actual agreement; to insist upon the test of "mutual" obligations would seem to deprive it of any separate meaning; and it has been suggested that it was inserted to cover a case where parties accepted restrictions not "because of any agreement with each other, but (for example) because of an agreement with a third party, or because of a request or plan prepared by a third party": Wilberforce, Campbell and Elles, *Restrictive Trade Practices and Monopolies*, p. 246. In this context it is interesting to look at the sections affecting a trade association, *i.e.*, "a body of persons (whether incorporated or not) formed with the purpose of furthering the trade interests of members." Section 6 (7), for example, provides that where the association makes recommendations, express or implied, to its members about matters falling within section 6 (1), then the registration provisions of Part I of the Act apply to the constitution of the association, *as if* it contained a term whereby members agreed to comply with those recommendations, *notwithstanding* any provision to the contrary therein. This statutory ousting of express terms by implied terms which contradict them will quickly find a place in the footnotes of the books on contracts. But what is sauce for the trade association should surely be sauce for a body of dealers organised into a network by one supplier, each entering into an agreement in reliance upon the rest of the family of agents doing the same. Section 6 (7) illustrates the intention of the statute to look for substance rather than assess the sartorial ingenuity with which the body has been fitted out with legal dress, and section 6 (3) surely has the same objective. There will be many cases where the only evidence of concert is parallel action; the courts in the United States have for long wrestled with the difficulties of "conscious parallelism"; but such practices will not be easily brought within the scope of our Act if proof of "arrangement" is made as difficult as the *Austin* case suggests.

There is, however, another solution which may be attracting the attention of those who call the tune. If they take over companies in the network, and make them subsidiaries within the meaning of section 154 of the Companies Act, 1948, the 1956 statute can be ignored. Such "inter-connected bodies" corporate are to be treated as a single person (s. 6 (8)), and agreements between them are an internal matter and not registrable at all. Bigger

and better company "groups" may well be one important result of the 1956 Act.

K. W. WEDDERBURN.

MARRIAGE—FOREIGNER IN ARMED FORCES ABROAD—COMMON LAW
MARRIAGE—UNDER BRITISH COMMAND

A BRITISH subject who wishes to marry abroad enjoys the privilege of having his marriage solemnised in accordance with the Foreign Marriage Acts, 1892–1947, by a specially designated marriage officer, or, if he is a member of the armed forces of the Crown, by a chaplain serving with the forces in the territory or by a person authorised by the commanding officer of those forces. Where no such persons are available, he can marry in common law form if the local formalities are inappropriate for the celebration of a monogamous marriage or if facilities for the performance of a marriage ceremony are lacking altogether.

The disturbed conditions in Europe at the end of the Second World War have brought the problem of informal or formally deficient marriages to the fore once again. However, the circumstances differ considerably from those for which the use of the common law marriage was originally devised. In *Taczanowska v. Taczanowski* [1957] 3 W.L.R. 141 the Court of Appeal was called upon to determine the formal validity of a marriage which had been celebrated on July 16, 1946, in Rome between two Polish nationals who were domiciled in Poland. The husband was a member of the Polish forces then serving in Italy with the Allies. The wife was a refugee from Poland. The marriage was concluded in religious form before a Roman Catholic chaplain serving with the Polish forces in accordance with the Polish law of November 25, 1926, concerning the ecclesiastical organisation of the army clergy. It was invalid according to Italian domestic and private international law which referred to the national law of the parties. The new Polish marriage law of September 25, 1945, enacted by the Polish Government in Lublin, provided exclusively for a civil marriage ceremony. The Government of Lublin had been recognised by the British Government as the Government of Poland on July 5, 1945. On February 14, 1946, the Polish Government announced that it no longer recognised the Polish forces in Italy as part of the Polish army.

Three arguments were advanced in support of the formal validity of the marriage. In the first place reference was made to the Polish Resettlement Act, 1947, s. 9 (8) in conjunction with section 9 (2). This provided that between January 1, 1945, and the coming

into force of the Act, the powers conferred by the Allied Forces Act in regard to the discipline and internal administration were to be deemed to have been exercisable in relation to the Polish forces by reference to the law of Poland in force on January 1, 1945, as if these Polish forces had not ceased to be recognised by the Polish Government. In the second place, it was contended that the marriage was valid according to the Foreign Marriage Acts, 1892-1947, which allow marriages within the British lines to be celebrated by any chaplain officiating under the orders of a commanding officer of a British army serving abroad. In the third place, it was argued that the parties had concluded a valid common law marriage.

Karminski J., at first instance, rejected all three arguments ([1956] 3 W.L.R. 935). The Polish Resettlement Act, 1947, s. 9 (8) did not apply because it was restricted to forces defined by the Allied Forces Act, 1940, *i.e.*, allied forces in the United Kingdom or on board H.M. ships or aircraft. The Foreign Marriage Acts, 1892-1947, did not apply because these Acts were limited to cases where at least one party was a British subject and, possibly, because the army chaplains attached to the Polish army in Italy could not be regarded as serving under the orders of the commanding officer of a British army serving abroad. A common law marriage was excluded because the parties were domiciled in Poland and because they could avail themselves of the facilities provided by Italian law for concluding a formally valid marriage in Italy.

The Court of Appeal reversed the decision on the ground that the parties had concluded a valid common law marriage. Two comments are called for in passing. Hodson L.J. was inclined to hold that the Foreign Marriage Act, 1892, s. 22, was not restricted in its application to cases where one of the parties at least was a British subject. It is difficult to follow this view, having regard to section 1 (1) of the same Act. In so far as he held that section 22 of the Foreign Marriage Act, 1892, was excluded because the Polish army chaplain was not officiating under the orders of the commanding officer of a British army serving abroad although the Polish corps was under British operational command, an interesting distinction has been introduced which invites a comparison of section 22 of the Act of 1892 with S.R. & O. 1947, No. 2875, art. 2 (4) (b) and with section 1 (1) of the Polish Resettlement Act, 1947.

The decision rests on the ground that the *lex loci celebrationis* does not apply to an army of occupation. This result, which was foreshadowed by *Burn v. Farrar* (1819) 2 Hag.Cons. 369 and *Ruding v. Smith*, *ibid.*, 371, 380, need not necessarily lead to the conclusion

that members of the army of occupation are free to conclude a common law marriage. Such a marriage is admitted where no other ceremony is available. An army of occupation is not bound by the local private law; by the same token it is free under public international law to provide its own regulations for all matters which would otherwise be governed by the *lex loci*. This positive privilege, accorded to armed forces only, and not the unwillingness of any group of persons or of any individual to submit to the local law, justifies the exclusion of the latter (but see now *Kochanski v. Kochanska* [1957] 3 All E.R. 142). Where the validity of such regulations is challenged in other countries, the question arises whether it suffices to test it by reference to the powers conferred by international law to make regulations which take the place of the local law, so far as the occupying forces are concerned, or whether it is necessary to apply the law of the country which governs the organisation of the unit. In the present case the Polish corps in Italy was not governed by any domestic system of laws, since the Polish Government did not recognise the corps as part of the Polish army, and since the Allied Forces Act and the Polish Resettlement Act did not operate in Italy. Yet to hold that all measures of discipline and internal administration (of which the celebration of marriage is one, in the opinion of the Court of Appeal) were invalid must have far-reaching consequences. As regards the celebration of marriage, the Court of Appeal was able to sustain their validity by recourse to the doctrine of common law marriages. Normally only British subjects faced with the legal or physical inability to marry in local form can conclude a common law marriage. British soldiers would be entitled to use this form, but for the statutory provision contained in the Foreign Marriage Acts. It is another question whether a common law marriage is available to foreign nationals domiciled abroad and to members of foreign armed forces serving with the British army, especially if the marriage takes place in a European country where conditions are disturbed but where the law provides the necessary facilities for concluding a monogamous marriage.

The former question was answered in the affirmative by the Court of Appeal, following *Savenis v. Savenis* [1950] S.A.S.R. 309. However, this decision was questioned in *Fokas v. Fokas* [1952] S.A.S.R. 152 and was not followed in *Maksymec v. Maksymec* (1954) 72 W.N. (N.S.W.) 522, which favoured the application of the *lex domicilii* where the *lex loci celebrationis* is inoperative. See the critical notes by Donovan (1951) 25 Austr.L.J. 165, and by Fleming, *ibid.*, p. 406; (1951) 4 I.L.Q. 500. As regards the latter question, reliance on the requirements of a common law marriage

may lead to a negative result if the regulations of the foreign unit of occupation, in circumstances such as those of the Polish corps in Italy, require a marriage to be concluded before an officer and prohibit any chaplains from performing a marriage ceremony. To conclude, a foreign army occupying territory of another foreign country is exempt from the *lex loci* in matters of discipline and internal administration. The rules which govern the latter are those approved by the commanding officer. These take the place of the *lex loci celebrationis*. English courts are not bound to go behind the rules themselves and to examine their validity in the light of any domestic law.

K. LIPSTEIN.

CRIMINAL LAW—"MALICIOUSLY"—"KNOWINGLY"

IN two recent cases the Court of Criminal Appeal has had to consider the interpretation to be placed upon the words "maliciously" and "knowingly" respectively in the statutory definition of certain crimes, and has in each case arrived at a decision consonant with academic opinion.

In *R. v. Cunningham* [1957] 3 W.L.R. 76, C. was charged under section 23 of the Offences against the Person Act, 1861, with having unlawfully and maliciously caused his prospective mother-in-law, W., to take a certain noxious thing, coal-gas, so as thereby to endanger her life. W. lived in a house adjoining an unoccupied house that was to be C.'s marital home. The two houses had formerly been one. On separation, the cellar had been divided only by a "honeycomb" wall of rubble, loosely cemented together. C., being short of money, tore the gas meter from the cellar wall of the vacant house, thus releasing the mains supply of gas at large, and stole the meter and the money in it. The gas percolated through the "honeycomb," and partially asphyxiated W. who was sleeping next door. The court quashed the conviction under section 23, as the jury had not been directed that C. could not be guilty unless he foresaw that the removal of the meter might cause personal injury to someone. The learned court cited Kenny, *Outlines of Criminal Law*, 16th ed., 186, repeating the principle enunciated in the very first edition, for the proposition that the word "maliciously" does not mean wickedly, but intentionally or recklessly. In other words, unless the accused had foreseen that the particular kind of harm inflicted might ensue, he had not acted with malice. Several well-known authorities support this proposition. The nearest to the facts of this case is *R. v. Faulkner* (1877) 13 Cox 550 (T.A.C. 199), where the Irish Court for Crown Cases

Reserved held that F. could not be convicted of maliciously setting fire to a ship, contrary to the Malicious Damage Act, 1861, s. 42, where he lit a match while stealing rum from a cask, the rum caught fire and the ship was destroyed, unless he foresaw the possibility of the fire. The Irish court followed *R. v. Pembliton* (1874) L.R. 2 C.C.R. 119 (T.A.C. 197), where P. threw a stone at certain persons, and broke a window and was held not to be guilty of maliciously damaging the window under section 51 of the same Act, unless he foresaw the possibility of damage to the window. Thus malice to the person could not be transferred to the window, nor malice to the rum to the ship, nor malice to the gas meter to the mother-in-law designate.

In the second case, *R. v. Hallam* [1957] 1 Q.B. 569, H. was charged under section 4 (1) of the Explosive Substances Act, 1883, with knowingly having in his possession an explosive substance without a lawful object. The question was whether the word "knowingly" referred not only to the fact of possession, but also to the explosive nature of the substance. In *R. v. Dacey* (1939) 27 Cr.App.R. 86 the Court of Criminal Appeal had held that the prosecution had only to prove that the accused was knowingly in possession of a substance that was in fact explosive, and need not establish that he knew it to be explosive. The Court of Criminal Appeal is not absolutely bound by its previous decisions: *R. v. Taylor* [1950] 2 K.B. 368, 370; and if it seems that in a previous decision the law was misapplied or misunderstood, a full court is assembled to reconsider it. Five judges composed the court in *Hallam's* case, and they refused to follow *R. v. Dacey*. It was held that the prosecution must prove that the accused knew the substance had explosive properties, though it was unnecessary to show chemical knowledge on his part. This decision is in accord with the criticism of *Dacey's* case in Glanville Williams, *Criminal Law*, 132. Dr. Williams advocates the adoption of a general rule of statutory interpretation that the requirement of knowledge, once introduced into an offence, governs the whole, unless Parliament has expressly provided to the contrary. Pending the acceptance of any such general principle, the courts examine each particular statute on its merits. Only seven days after the *Dacey* decision, two members of that very court held that the word "knowingly" in section 1 (a) of the Dramatic and Musical Performers' Protection Act, 1925, governed all the ingredients of the *actus reus*: *Gaumont British v. Henry* [1939] 2 K.B. 711 (Hewart C.J. and Humphreys J.). This was plain, because the word preceded the particular subsection in question, and therefore inevitably applied to the whole of it. A statute of 1901 enacted that it was an

offence knowingly to sell intoxicating liquor to any person under the age of fourteen years excepting such as is sold in corked and sealed vessels. In *Groom v. Grimes* (1903) 89 L.T. 129, Alverstone L.C.J. and Channell J. held that the accused must have knowledge not only that he was selling an intoxicant, but also that the child was under age. In *Brooks v. Mason* [1902] 2 K.B. 743 these same two judges had, however, held that the word does not govern the exception as to supply in sealed vessels. As an exception is in question, the onus is on the accused to establish that the vessel was sealed, and honest belief does not suffice.

The rejection of *Dacey* as an authority availed the accused Hallam nothing, because the court applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907. This suggests that technically the observations in *Hallam* were *obiter*, at any rate if the view of Llewellyn (*The Bramble Bush*, 39; also Megarry, 64 L.Q.R. 28, 193, 454; *contra* Dr. Morris, *ibid.*) that no rule can be *ratio decidendi* from which affirmance of the decision does not follow, is strictly adhered to.

R. N. GOODERSON.

CRIMINAL LAW—CONSPIRACY—AGREEMENT TO BE PERFORMED ABROAD

It was an American judge who once described conspiracy as an "elastic, sprawling and pervasive offence." In more restrained language Lord Tucker in *Board of Trade v. Owen* [1957] 2 W.L.R. 351 remarked how ill-defined and uncertain were its limits. Re-assuring, therefore, is the House of Lords' dismissal in this case of the prosecution's appeal from the decision of the Court of Criminal Appeal, *sub. nom. R. v. Owen* [1957] 1 Q.B. 174, noted in [1956] C.L.J. 166. That court had allowed an appeal against a conviction for conspiracy where the accused had agreed in this country to make fraudulent representations abroad in order to obtain export licences from a foreign government.

Lord Tucker, whose opinion was that of the whole House, was prepared to treat this potentially as a conspiracy to defraud, but was not attracted to any distinction turning on its being an agreement for acts "*mala in se*." Yet the gist of all conspiracy is the agreement itself, which undoubtedly took place in this country.

Lord Tucker turned for assistance to the history of the crime. It was clear that agreements to commit offences had been treated by the Star Chamber on the analogy of attempts, and punished in order to prevent the commission of substantive offences. Conspiracy "is all part and parcel of the preservation of the Queen's

peace within the realm." Hence, it should hardly concern itself with agreements to be carried out beyond the realm.

But the trial judge had been disturbed at the possibility of this country becoming a "sanctuary for conspirators." The House had a compelling answer. Far-ranging though the offence of conspiracy might be, it had never previously been held to apply in circumstances such as these. The question whether it should be so extended, declared Lord Tucker, "is not one which is suitable for your Lordships sitting in your judicial capacity"—a welcome confirmation that the courts have now renounced the right to create new crimes.

But there are signs perhaps of dispute ahead. Lord Tucker reserved for future consideration the question whether a conspiracy to be performed abroad might not be indictable if its performance would produce a public mischief here. The mention of this offence returns us at once to a field of uncertainty and doubt; and is scarcely conducive to that "maximum degree of definition" which his Lordship had agreed was desirable for the criminal law.

J. C. HALL.

NEGLIGENCE—FIRE—RYLANDS *v.* FLETCHER—ACT OF A STRANGER

Balfour v. Barty-King and Another, Hyder & Sons (Builders), Ltd. Third Parties [1957] 1 Q.B. 496 is noteworthy for the number of points raised by it concerning liability in negligence, under *Rylands v. Fletcher*, for fire, for independent contractors, and for extra-hazardous operations, but unfortunately the judgment of the Court of Appeal is confined to liability for the spread of fire. The defendants, husband and wife, were the owners and occupiers of a dwelling-house which was contiguous to that of the plaintiff. The defendants requested two workmen, employed by independent contractors, to thaw out some frozen pipes in their loft which contained a large quantity of straw. The workmen applied a blowlamp to the pipes which were lagged with felt. The felt caught fire, ignited the straw and the fire spread rapidly and damaged the plaintiff's house. The plaintiff sued the defendants who joined the independent contractors as third parties. The Court of Appeal upheld the decision of Havers J. that the defendants were liable to the plaintiff and that the independent contractors were liable to the defendants. On the findings of the learned judge, the independent contractors were also responsible to the plaintiff, but they had gone into liquidation and had entered no appeal.

Three points were determined by Havers J. (1) The defendants

were liable to the plaintiff because the fire which escaped from the defendants' premises was caused *negligently*; it was negligence to use the lamp in proximity to inflammable material. Section 86 of the Fires Prevention (Metropolis) Act, 1774, has only altered the strict common law liability of a person on whose premises a fire *accidentally* begins. The act of a stranger is a defence to the common law liability for the escape of fire, but the independent contractors were not strangers for this purpose as the defendants had invited them to their house to do the work. (2) The defendants were liable under the rule in *Rylands v. Fletcher*, for the Act of 1774 is no defence if the fire has its source in an object which is within the rule: *Musgrove v. Pandelis* [1919] 2 K.B. 43. Havers J. held, as a matter of law, that the use of the blowlamp in these particular circumstances constituted it an object to which the rule applies. Further, if it was a necessary requisite for the application of the rule to this case, bringing the blowlamp to the position in which it was ignited and used was to make a non-natural use of the place. *Sochacki v. Sas* [1947] 1 All E.R. 344 shows that an ordinary fire in a domestic grate is a natural user of land and there is no liability for its escape in the absence of negligence.

(3) The defendants might also be liable on the general but somewhat undefined principle expressed in the maxim *sic utere tuo ut alienum non laedas* as particularly exemplified in *Honeywill & Stein, Ltd. v. Larkin Brothers, Ltd.* [1934] 1 K.B. 191: that, in the case of ultra-hazardous acts, *i.e.*, acts which from their nature involve in the eyes of the law special danger to others, an obligation is imposed on the ultimate employers to take special precautions and they cannot escape liability by having the work carried out by independent contractors.

The Court of Appeal affirmed the decision on the first ground, but did not deal in detail with the conception of liability for independent contractors, nor did they refer to liability for dangerous operations. They did not think it necessary to consider the doctrine of *Rylands v. Fletcher* as a separate head of liability, although it applies to fire and is subject to the exception of the damage being caused by a stranger. The independent contractors here were not strangers for the defendants had control of them in that they chose them, invited them to their premises to do the work and could have ordered them to leave at any moment, although of course they had no control of the manner in which the work was to be done so as to make the relationship between them that of master and servant.

T. ELLIS LEWIS.

MASTER AND SERVANT—DUTY OF MASTER—DEFECTIVE TOOL

Davie v. New Merton Board Mills, Ltd., and another [1957] 2 W.L.R. 747 is an interesting case and may become an important one. It is now on appeal.

The plaintiff, a maintenance fitter employed by the first defendants, lost an eye by reason of a piece of metal flying off the head of a steel tool, a drift, provided by his employers, when in the normal course of his employment he struck it with a hammer to knock out a metal key. Ashworth J. at first instance found that the drift was dangerous because chips of metal might fly off it when struck, but that the danger resulted exclusively from the excessive hardness of the drift. This excessive hardness was due to the lack of proper care shown by the second defendants in its manufacture. The dangerous quality of the drift could not have been discovered by any inspection reasonably to be expected of the first defendants, to whose own servants and agents no default could be attributed. The drift had been bought from a reputable supplier and the normal price paid for it.

So far as the first defendants were concerned, the question for decision was accordingly a pure question of law—namely the nature and extent of the duty owed by an employer to his servant. Ashworth J. held that a breach of that duty had been committed and the employer was liable to the workman.

The headnote of the report is entitled “negligence” and in the body of the report it is stated that “the plaintiff claimed damages for negligence” as much against the first defendants the employers as against the second defendants the manufacturers. Ashworth J. held the manufacturers also to be liable, but this aspect of the case need not detain us except that it may be noted that, as against them, the action is evidently one in tort and is based upon the principle of *Donoghue v. Stevenson* [1932] A.C. 562—which is commonly believed to have established a liability in negligence of a plain and ordinary sort.

The fact that the action against each of the defendants is given the same title—negligence—might lead the unwary student to suppose that the propositions made concerning the nature and extent of the liability of the one, the employer, would be true about the nature and extent of the liability of the other, the manufacturer. The student must not allow himself to fall into any such trap. Whether or not Ashworth J.’s decision touching the employer’s liability is warrantable, it is not concerned with the nature and extent of the duty owed *generally* in the law of tort where the defendant is under a *duty of care* the breach of which

constitutes negligence. It would, for example, be news indeed that the *driver* of a car in England—it is otherwise in France—is to be held liable in negligence to a pedestrian whom he has knocked down if the collision is due solely to the default of the *manufacturer* in negligently making the car with a mechanical defect not reasonably discoverable by the reasonable driver or his chauffeur. Indeed the first lesson of *Davie's* case for the student is that the word “negligence” has now so chameleon a character that it is practically meaningless. Instead of asking himself whether there has been “negligence,” he should ask “What is the *particular* duty the breach of which the court is here concerned to discuss under cover of the Pickwickian word negligence: of *what duty* does the court hold *this* conduct of this defendant to constitute a breach?” If Ashworth J.’s decision is warrantable at all, it is relevant only to the special and peculiar duty which arises in the master out of the special and peculiar relationship of master and servant.

It is some argument *against* the correctness of Ashworth J.’s conclusion of liability that he seems to support that conclusion on a *general* principle—namely that where there is a “personal” duty of care, the defendant is necessarily liable for the default of a third party such as the manufacturer in our case. The learned judge’s line of argument seems to be that if the duty is “personal” the person owing it cannot so “delegate” its performance to even a competent “independent contractor” as to escape liability: he remains liable if that independent contractor is himself negligent. In our case there was a contract with the manufacturer and the manufacturer was negligent. Therefore, if the duty of the master is “personal”—which admittedly it is—the master must be liable in respect of the tool which he bought from the negligent manufacturer, who was an “independent contractor.”

The fallacy of this argument as a general principle is that the term “independent contractor” is an undistributed middle. Because a person may in certain circumstances be liable for the acts of *some* third parties it does not follow that he is liable for the acts of *all* third parties even if he be in contract with them. Another way of putting the point is that it is not the existence of *some* contract which makes a third party an independent contractor for the purposes of the rule, even if there be a rule that there is liability in respect of independent contractors; rather, there seems then only to be an independent contractor for the purposes of the rule when a defendant who is under a “personal” duty makes with the third party *such* a contract as constitutes that party, though not a servant, the person through whom the defendant seeks to discharge his own personal duty. Instead, therefore, of asking

whether there was a contract, we should ask whether there was *such* a contract as constituted the third party the independent contractor of the defendant.

In our case the contract in question was a contract of sale. *Prima facie* a contract of sale does not make the seller an agent or independent contractor of the buyer: he is simply a person who has contracted with the buyer. As long ago as 1936, the learned editor of Salmond, Dr. Stallybrass, called attention to this fallacy (see note (d) on p. 89 of the ninth edition of Salmond's *Torts*, repeated as note (a) on p. 98 of the eleventh edition). If, therefore, the first defendants' liability in *Davie's* case is offered to us as necessarily flowing from the nature of "personal" liability as such in the law of tort, it is respectfully submitted that the conclusion is not well founded.

We cannot, however, ourselves conclude that the decision in *Davie's* case is wrong, without more; for there is a *contractual* relationship subsisting between master and servant to which attention is increasingly being called (see, *e.g.*, *O'Reilly v. I.C.I.* [1955] 1 W.L.R. 1155, 1163, *per* Jenkins L.J.); and not infrequently, by contract, there may arise such a type of duty as would make the first defendants liable to the plaintiff in *Davie's* case, however unusual such a duty may be in tort. By contract a man may and frequently does undertake that an operation or thing is fit for a particular purpose so far as care and skill on the part of *anybody* can make it fit. Indeed, he may go further and undertake absolutely that a thing *is* fit for the particular purpose—for example a shipowner at common law was deemed to undertake absolutely the seaworthiness of his ship. It is admitted that a master does not give to his servant an *absolute* undertaking as regards his threefold obligation—namely, to requote an often quoted citation, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision" (*per* Lord Wright in *Wilsons & Clyde Coal Company v. English* [1938] A.C. 57, 78). But is he to be deemed to give, by his contract, the *qualified* undertaking that provision, of safe material at any rate, will be made if by the care and skill on the part of *anybody* it can be made?

There is precedent at common law for such an undertaking to be implied in a contract—for example, in the case of railway companies towards passengers in respect of railway carriages (see *Readhead v. Midland Railway* (1869) L.R. 4 Q.B. 379). Is it or is it not to be implied in respect of tools in a contract of service? There would be nothing legally shocking or even surprising in such an implication, but I venture to believe that the balance of authority

previous to *Davie's* case was against that implication. In the leading case on the matter (*English's* case, *supra*) Lord Thankerton in particular (with whose judgment Lord Wright expressly concurred) repeated, with what might have seemed an unnecessary reiteration, that the duty of the master was to *use due care* in the provision of a reasonably safe system of working; and though Lord Thankerton was willing to make the master liable for the default of an agent "appointed to attend to the discharge of such duty," his words not only are not apt to carry the required undertaking but seem to be directed to negating it. The only direct authority upon which Ashworth J. relied was the Scottish case of *Donnelly v. Glasgow Corporation*, 1953 S.L.T. 161, and in that case the learned Lord Justice-Clerk reached his conclusion only because he felt able to treat the manufacturer and seller of the omnibus there in question as a person "employed" by the master to provide the plant: which seems an odd use of the term "employed." The direct English authority *Mason v. Williams & Williams, Ltd.* [1955] 1 W.L.R. 549 was against Ashworth J.'s conclusion.

However the matter may be decided upon appeal, or further appeal, it will be enough for a student to note that the decision rationally depends, in this case as in most others, not from confused discussion of some generic "negligence" nor from an attempt to ring the changes on the terms "agent," "independent contractor" and "personal" but from a determination of the nature and extent of the duty which it is the policy of the law to put upon the defendant in the particular relationship in question. It would no doubt also be helpful to the student if that determination, when made by the court, were plainly identified by the court: it is not helpful to him to be told that the duty is a duty to take care to supply suitable appliances when the duty in fact determined is the very different duty which results from a warranty that the appliances are fit for the particular purpose so far as care and skill on the part of anybody can make them fit.

C. J. HAMSON.

NUISANCE—TREE ROOTS—DAMAGE TO ADJOINING PROPERTY

Davey v. Harrow Corporation [1957] 2 W.L.R. 941 arises in a setting where it is surprising to find the common law not yet settled in detail. The plaintiff's house had subsided by reason of encroaching roots from elm trees on the adjoining property of the defendant. He claimed damages for nuisance and an injunction. Sellers J. at

first instance decided that the trees in question did not belong to the defendant, but the Court of Appeal on hearing further evidence reversed this decision of fact and gave judgment for the plaintiff, but only after answering certain arguments propounded for the defence.

It was argued first that there was no precedent for awarding damages for such encroachment. The court did not find any difficulty in meeting this contention. Overhanging branches and encroaching roots have always been treated similarly in the tort of nuisance and there is no doubt a neighbour may abate in either case. The court approved the dictum of Kay L.J. in *Lemmon v. Webb* [1894] 3 Ch. 1 at 24, that an action on the case lay for damage caused by tree roots; see also *Butler v. Standard Telephones* [1940] 1 All E.R. 121.

The corporation then argued that no action lay unless the trees were planted and not self-sown and that no action lay where damage was caused by natural growth or natural causes. The one case giving colour to the first contention was *Crowhurst v. Amersham Burial Board* (1878) 4 Ex.D. 5. There the defendants had planted two yew trees. Their branches grew into the adjoining meadow where the plaintiff's horse ate some of the leaves and perished. The decision for the plaintiff was based on the rule in *Rylands v. Fletcher* in that a dangerous thing had been brought onto the land and allowed to escape. On the other hand, in *Smith v. Giddy* [1904] 2 K.B. 448 the defendant was held liable for nuisance because his trees overhung and spoilt his neighbour's crop. The report does not say how the trees came to be there and the court did not advert to the distinction, though treating the case as analogous to *Crowhurst*. The earlier case may be justified on its own grounds but it is dangerous in encouraging confusion between principles of liability in nuisance and under *Rylands v. Fletcher*. It is true that Blackburn J. had spoken of him "who for his own purposes brings on his land and collects and keeps there anything that is likely to do mischief if it escapes," but it is clear that an occupier is liable under *Rylands v. Fletcher* even for the escape of things naturally on his land if he collects them in an accumulation that is likely to cause damage on escape. He need not bring them in to be liable. The two cases only show that there is no distinction to be drawn in nuisance between damage caused by trees innocuous in themselves and damage caused by trees which may be poisonous. Finally there are some wide dicta in *Noble v. Harrison* [1926] 2 K.B. 332 rejecting any difference between planted and self-sown trees as relevant in cases of nuisance.

The other argument, that the damage being caused by natural growth was not actionable, was based on the notorious case of thistles, *Giles v. Walker* (1890) 24 Q.B.D. 556, where the owner of newly ploughed forest land was sued and exonerated for the escape of thistledown from the luxuriant crop of thistles consequent on ploughing. This decision of a Divisional Court is short, simple and probably wrong. It is flatly inconsistent with *Margate Pier and Harbour Proprietors v. Margate Town Council* (1869) 20 L.T. 564 (not cited in *Giles v. Walker*) insofar as it is based on the view that the defendant had not done anything to cause the nuisance. But the substantial reason seems to have been that the thistledown was not regarded as noxious enough to constitute a nuisance. Lord Goddard C.J. thought that agricultural interests in 1890 probably attracted a less vigilant protection from the common law than that to be afforded today and "at any rate, this case did not deal with encroaching trees." But it may be premature to regard the case as dead. It was followed in 1948 in the case of pheasants, *Seligman v. Docker* [1949] 1 Ch. 53, where wild pheasants, inordinately numerous in the defendant's coverts, damaged crops on an adjoining farm.

Finally, there is *Pontardawe R.D.C. v. Moore-Gwyn* [1929] 1 Ch. 656, cited by the defendant to the same purpose. Here again there is thorough confusion of nuisance and the *Rylands v. Fletcher* principle. It may be taken as authority for the principle that there must be an unreasonable user of land to raise a case of nuisance and the fall of weathered rocks onto adjoining property was therefore not actionable. Eve J. relied on *Giles v. Walker* but the judgment is an uneasy ramble round the confines of *Rylands v. Fletcher*. The one criticism of the case levelled at it by Lord Goddard in the instant case was that the *Margate* case was not cited in it. This, however, is not so: see the report at p. 658.

To anyone looking back at the general trend of tort cases over the past century the instant case is chiefly interesting for the excellent illustration it affords of the tendency to attach liability to culpable omission. (After some damage already done the trees had been felled, but the roots were not poisoned so progressive damage continued.) The cases marking this tendency chiefly lie in the expanding field of negligence and nuisance, but may be found in all torts, e.g., *Byrne v. Deane* [1937] 1 K.B. 818 (a man may "publish" a libel written by another on his property if he unreasonably neglects to obliterate it). Finally it is pleasant to note the appreciative acknowledgment from the Bench of academic analysis, namely Professor Goodhart's essay on "Things Naturally

on the Land" in his *Essays in Jurisprudence and the Common Law*. The author says, p. 157, that it is hardly surprising that authority is wanting on liability for trees naturally growing on the land, "for most boundary trees in England have been planted." *Sed quaere*.

D. E. C. YALE.

MASTER AND SERVANT—INJURY TO SERVANT BY "HORSEPLAY
AND SKYLARKING"

IN *Hudson v. Ridge Manufacturing Co., Ltd.* [1957] 2 W.L.R. 948 Streatfeild J. (at Manchester Assizes) was asked to decide an interesting and unusual claim by a servant against his employers for breach of their common law duty to take care for his safety. The plaintiff servant was injured in the course of his work by a foolish prank practised on him by a fellow servant who, over the course of some years, had repeatedly made a nuisance of himself "through his almost incurable habit of tripping people up, or otherwise engaging in horseplay and skylarking." It was not contended that the employers were vicariously liable: the claim was for breach by them of their own duty not only to have reasonably safe plant, machinery and premises and a reasonably safe system of work and supervision, but also to employ reasonably competent fellow workmen (*Wilson's and Clyde Coal Co. v. English* [1938] A.C. 57, 78). Streatfeild J. found, on the facts of the particular case, that the employers were in breach of their duty because they had known of the fellow servant's habits for something like four years, had reprimanded him repeatedly, had contemplated that someone would be likely to be hurt, but had taken no further steps. "If, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger." The matter is one of degree. The employers are liable only if they should have foreseen that danger was likely to result from the conduct in question. There was no liability in *Smith v. Crossley Brothers, Ltd.* (1951) 95 S.J. 655, when a sixteen-year-old apprentice suffered a rupture of the colon through the activities of two fellow apprentices with a compressed air pipe. Although Pearce J. (at Manchester Assizes) found that the employers had not exercised adequate supervision, the Court of Appeal took a different view—the compressed air pipe had been in the same position for ten years, no accident had happened before and the "injury to the plaintiff resulted from what was

wilful misbehaviour by the other two boys and a wicked act which the defendants had no reason to foresee." Again, in *Smith v. Ocean Steam Ship Co., Ltd.* [1954] 2 Lloyd's Rep. 482, Gorman J. (at Liverpool Assizes) refused to find liability on the part of employers for the death of their ship's officer who had been stabbed by a native coolie taken aboard at an Indonesian port as a labourer for loading purposes. Such coolies had been taken on board on many previous occasions without report of any serious incident. The widow had failed to establish, on the facts, that the employers should have foreseen a danger of stabbing. In *Hudson*, on the other hand, the horseplaying servant had not tripped somebody up for the first time, or even on one or two isolated occasions. He had persisted in his pranks for a long time and had demonstrated that reprimand and warning were ineffective.

It will be remembered that in *Deyong v. Shenburn* [1946] K.B. 227 (recently applied in *Edwards v. West Herts. Group Hospital Management Committee* [1957] 1 W.L.R. 415) the Court of Appeal held that the relationship of master and servant does not in itself impose on the master a duty to take care that his servant's goods are not stolen. But what if they are stolen by a fellow servant who, to the master's knowledge, has stolen frequently in the past? *Hudson* raises a number of interesting possibilities—the effect of employing or retaining a servant with a record of indecent assault or homosexual activity, for instance—but it must not at present be pushed beyond its own facts.

F. J. ODGERS.

SALE OF GOODS—TITLE—NEMO DAT—ESTOPPEL

Of all the exceptions to the rule *nemo dat quod non habet* none is more difficult to state with accuracy than that embodied in the concluding words of section 21 (1) of the Sale of Goods Act, 1893, and generally referred to as estoppel. That section provides that a buyer of goods from one who is not their owner acquires no title "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." But what kind of conduct does the law recognise as sufficient to raise an estoppel against the owner? Much of the difficulty in answering this question arises from unguarded and unnecessarily wide judicial statements as to the meaning of estoppel. The most notorious, no doubt, is that of Ashhurst J. in *Lickbarrow v. Mason* (1787) 2 T.R. 63, where he said that "whenever one of two persons must suffer by the acts of a third he who has enabled such third person to occasion the

loss must sustain it." And the Privy Council, nearly a hundred and fifty years later, purported to give effect to this statement when in *Commonwealth Trust v. Akotey* [1926] A.C. 72 they held that the mere act of allowing one's goods to get into the hands of another was a sufficient "enabling" to prevent one thereafter denying that person's authority to sell.

It is now clear, however, that such propositions are far too wide; the Privy Council itself in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* [1938] A.C. 287 at 298 considered that *Akotey's* case was "one which it would not be safe to follow"; and of Ashhurst J.'s dictum Donovan J. has recently said (in *Jerome v. Bentley* [1952] 2 All E.R. 114 at 118): "Everything depends on the word "enabled" in this passage. If I carelessly leave my front door unlocked so that a thief walks in and steals my silver, I have, in a sense, enabled him to steal it . . . but that does not prevent my recovering it from some innocent purchaser." And though, more recently still, the Court of Appeal was divided as to what constituted estoppel in such circumstances (see *Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.* [1956] 3 W.L.R. 1068), there seems reasonably clear authority for the following proposition: an owner of goods owes no duty of care to the general public or to an individual either (a) in seeing that his goods are kept safely or (b) in choosing the persons to whom he entrusts the custody of his goods or of the documents of title to those goods. This, it must be admitted, is but to express the position negatively and the student may well ask whether it is not possible to give some positive indication of the kind of conduct which will raise an estoppel. It is suggested, by way of answer, that one such situation arises where A, the true owner, stands by and allows his goods to be sold by X to B, who is under the impression that they belong to X. In such circumstances, if A allows B to buy on the faith of an understanding which A can but does not contradict, then A is estopped from denying B's title.

Such, it is suggested, were the circumstances in *Eastern Distributors, Ltd. v. Goldring (Murphy third party)* [1957] 3 W.L.R. 237, C.A.. There one Murphy, who owned a Bedford van, wanted to buy a Chrysler car from a car-dealer named Coker. But since Murphy had not the means to pay the necessary deposit on the hire-purchase of the car, it was agreed that Coker should be authorised to sell the van to a hire-purchase finance company and then effect an agreement by the company to sell it to Murphy on hire-purchase terms; the price paid by the company for the van would then be applied in paying the deposits on the hire-purchase agreements of both the van and the car. To this end Murphy

signed the necessary hire-purchase documents which included a statement to the effect that the dealer, Coker, was the true owner of the van. Accordingly the plaintiffs, the hire-purchase company, bought the van from Coker for £180 and immediately executed a contract to sell it to Murphy on hire-purchase terms. The sale of the car, however, was not proceeded with and eventually Coker told Murphy that the whole transaction was cancelled. Murphy, who therefore regarded himself as still the true owner of the van, paid none of the hire-purchase instalments and subsequently sold the van to the defendant, who bought in good faith. On discovery of these facts, the plaintiffs sought the recovery of the van or its value.

The plaintiffs' claim was based solely on estoppel, for it should be observed that though Coker was a car-dealer, he was never in possession of the van so as to give a good title to the plaintiffs under the Factors Act, 1889, s. 2. The court was not prepared, however, to attempt any delimitation of the bounds of estoppel and contented itself by saying "It is sufficient to say that, whatever the limits of the doctrine, it clearly applies to the facts of this case. Coker was armed by Murphy with documents which enabled him to represent to the plaintiffs that he was the owner of the Bedford car (*sic*) and had the right to sell it" (p. 245). This statement, taken by itself, is almost as objectionable as the dictum in *Lickbarrow v. Mason*; what should be emphasised is what those particular documents said. Indeed, the point had been made earlier by Devlin J. when he said (at p. 241) "Coker represented that the car (*sic*) was his and Murphy was privy to that representation being made; so neither can be heard to say that Coker had not a good title to transfer to the plaintiffs." Put in this way the case is a neat illustration of the proposition suggested earlier, namely, that estoppel will operate against an owner who, knowing that someone is buying his goods from another, does nothing to correct the false impression under which he knows the purchaser is labouring.

T. C. THOMAS.

EQUITY—DOCTRINE OF ELECTION—ADEMPTION BY CONTRACT TO
DEVISE PROPERTY

THE Court of Appeal, in *Re Edwards, Macadam v. Wright* [1957] 3 W.L.R. 131, have now reversed the decision of Upjohn J. which was noted *ante*, pp. 28-29. The problem concerned a testatrix, the house in which she lived, her sister Elsie (*cf.* [1957] Ch. 21, 22—

“Elise”), and six other relatives of hers named Ravenhill. By her will she specifically directed that the house and her residuary estate be sold and the proceeds divided equally among these seven relatives.

Some three months after making her will, the testatrix entered into a contract with Elsie, for valuable consideration, to devise the house to Elsie absolutely. Two months afterwards she died, having attempted by codicil (invalid for want of due attestation) to carry out her promise. Thereupon Elsie (in an unreported action before Danckwerts J.) sued the executor of the will for specific performance; and it was adjudged that the contract was valid and binding and that accordingly the executor held the house upon trust for Elsie absolutely and was in duty bound to convey it to Elsie forthwith. It seems that he duly did so—see [1957] Ch. 21, 22. That decision, of course, detached the house (worth £2,000) from the residuary gift, to the detriment of the six Ravenhill relatives. They therefore sought to improve their position by contending that Elsie was now precluded, by virtue of the equitable doctrine of election, from claiming her one-seventh share (worth £800) in the remaining residue. The executor applied to the court to determine whether the doctrine affected her.

In the court below, Upjohn J. held (*ante*, pp. 28–29) that she was put to her election: the will had purported to give the house—as well as the residue—to be shared between her and the six Ravenhills; in fact, however, the house was hers; therefore she was bound to elect either to “take under the will” (so that the others would share the value of both house and residue as the will prescribed) or to “take against the will”—in which case she would keep her house but would be obliged to compensate the others out of such further benefits (her share of the remaining residue) as the will had given her. His Lordship held also that she had already elected against the will; and it seems that his judgment ended with words, not reported in [1956] 3 W.L.R. nor in [1957] Ch. 21, 28, indicating that she had so elected by obtaining her judgment for specific performance (see the judgment of Jenkins L.J. [1957] 3 W.L.R., at p. 138, and contrast his own dictum, at p. 133, that, if the doctrine of election applied here, she had elected by *bringing* the action).

In the Court of Appeal, the doctrine of election was held to be inapplicable. Each of the learned Lords Justices emphasised the general point that an equitable doctrine could hardly be supposed to have the inequitable result that one who acquires property from a testator, *inter vivos* and for value, is in consequence deprived by equity of other benefits which the testator’s will has given him.

Without resorting to an elaboration of that general point, however, their lordships were able to support their decision, as indicated below, by slightly extending, perhaps, the principle of ademption and by declining to extend the scope of section 24 of the Wills Act, 1837.

When a testator, after making a will in which he devises certain property, disposes of that property *inter vivos*, the devise is adeemed and so is inoperative. The devise is adeemed likewise where, as in the present case, the testator after making the will makes a specifically enforceable contract to dispose of the property; for here, at any rate if an order of specific performance is ultimately made (see Jenkins L.J., at p. 136), he is at his death a bare trustee of it. Accordingly, when the present testatrix died, her devise of the house was a complete nullity and had, in effect, been revoked (pp. 137, 139): it was no longer a gift or even an attempted gift by her of the house—now Elsie's property beneficially; consequently, the fundamental requirement for a case of election was absent.

Upjohn J. had relied chiefly upon section 24 of the Wills Act—whereby every will which shows no contrary intention is to be construed, as regards the property comprised in it, as though the testator had made it immediately before his death. But the Court of Appeal held that, where questions of ademption arise, this section cannot preclude one from adducing evidence about changes in the ownership of property comprised in the will which occur before the testator's death; for without such evidence no ademption could ever be established. Romer L.J., indeed, expressed the view (at p. 140) that, when questions of election arise, events which happened between the date of the will and the date of death can always be considered, whether or not some question of ademption has arisen also.

Thus the contention on behalf of the six Ravenhill relatives that, since the Wills Act, the first requirement in establishing a case of election is simply that the testator's will purports—or “expresses his intention” (*per* Lord Hatherley in *Cooper v. Cooper*, L.R. 7 H.L. 53, 70)—to give to A property which in fact belongs to B, failed. One is entitled, in spite of the Wills Act, to unearth the facts. And if they show that the testator owned the property when he made his will, but subsequently disposed of it by some transaction *inter vivos*, the purported gift of it by his will is adeemed and has become a complete nullity; hence it cannot rouse the doctrine of election: for now it neither purports to give, nor expresses any intention to give, the property to A.

S. J. BAILEY.

RESTRICTIVE COVENANT—BENEFIT—ASSIGNMENT—BUILDING SCHEME

IN the law relating to restrictive covenants the rules for the running of the benefit of a covenant are harder to master than the rules for the running of the burden. The former topic is somewhat thickly studded with decisions capable of provoking doubt, and their number is now perhaps augmented by the decision of Wynn-Parry J. in *Re Pinewood Estate, Farnborough* [1957] 3 W.L.R. 256. In this case the court had to consider the three accepted methods of making the benefit of a covenant run with the covenantee's benefited land, namely annexation to the land by suitable language, the creation of a "building scheme," and assignment; and it was held that, if the first two of these are both wanting, a successor in title who seeks to enforce the covenant must be able to show a complete chain of assignments between the covenantee and himself. This insistence upon a complete chain has the appearance of a rule both novel and severe. For earlier authority (such as it was) indicated that if the benefit of the covenant was once effectively assigned along with the benefited land it would thenceforth run with it automatically to future successors in title, just as if it had been properly annexed in the first place. The *Pinewood* case evidently had that pattern of events, yet there was silence as to the opinions of former judges.

The land in question was part of a large building estate which had been laid out in 1899. But the building scheme, in its legal sense, lasted for a matter of days only, for the purchasers at once entered into a deed of release and fresh covenants. The new covenants were held not to be part of any building scheme, and since there was no formula of annexation the parties had thus seriously weakened the prospects of the benefit of the new covenants passing to their successors. But the plot for which the benefit was claimed had been sold in 1907, and the benefit had then been expressly assigned along with it, so that up to that point all was well. In 1919 it was sold again, this time without any reference to the covenants. Thereafter it was subdivided, and the question was whether the covenants could still be enforced by the owner of one part of it.

It is not quite certain from the reported facts that the sale of 1907 was the first disposition of the land after 1899. But it seems probable that it was, and in that case the textbook solution should have turned upon the effect of the assignment made at that time. In three leading cases (*Renals v. Cowlishaw* (1878) 9 Ch.D. 125 at 130-131, *Rogers v. Hosegood* [1900] 2 Ch. 388 at 408, and *Reid v. Bickerstaff* [1909] 2 Ch. 305 at 320) learned judges have

spoken as if the effect of an express assignment by the original covenantee along with the benefited land had the same effect as initial annexation, so that from then on the benefit would run with the land automatically. The clearest of the three statements is the earliest, where Hall V.-C. in his well-known judgment said: "If it had appeared in the conveyance to [B, the plaintiffs' predecessor in title] that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that [B] was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them." And this was referred to with approbation by a unanimous Court of Appeal in *Rogers v. Hosegood*. These authorities are cited by Professor Bailey in his invaluable article in (1938) 6 C.L.J. at 360. There is surely much to be said for this doctrine, for once the first assignment has settled the fact that the benefit of the covenant is to follow the land, and is not to remain the personal property of the covenantee, there is no more reason to demand express assignments on future occasions than in the case of a covenant duly annexed. The law on the matter is quite technical enough already, and to insist upon "a complete chain of assignments", merely for form's sake is something which the judges who framed the principles of restrictive covenants would probably not have done. Yet in the *Pinewood* case the need for a complete chain was assumed, it appears, without argument.

The case which was in fact put forward for enforcing the covenants was that they were entered into in substitution for those of a genuine building scheme, and with an equal intention that the plots of all the parties should be bound and benefited likewise. The learned judge rejected this contention on the ground that it was an attempt to set up a fourth, and unknown, mode of transmitting the benefit of a covenant. But where plot-holders enter into a substitutionary scheme of this kind it would not be stretching the law very far to regard it as partaking of the qualities of the antecedent building scheme, and it might be thought reasonable to allow the benefit to run under the modified scheme. This would not be introducing a fourth method of transmitting the benefit, but rather allowing the scheme to count as a building scheme because it was, in substance, nothing else than the original scheme with agreed modifications. This would not weaken the strictness of the rules governing building schemes, and it would allow the covenants to have the beneficial operation which the parties intended.

The final misfortune of the ill-starred substitutionary covenants was that one of the covenanting parties had purported to covenant

with himself and another jointly, the joint covenantors being the predecessors in title of the party seeking to enforce the covenants in the present case. The old rule that such covenants were void was abolished by section 82 of the Law of Property Act, 1925, not only for the future but retrospectively. Yet in *Ridley v. Lee* [1935] Ch. 591 Luxmoore J. interpreted this amendment restrictively, so as not to save a covenant in a building scheme. In the present case the learned judge said that he would if necessary have reached the same conclusion. This also is not easy to understand, for Luxmoore J.'s reasoning was wholly directed to the existence of a building scheme (the hypothesis which the learned judge had already rejected) and it is not obvious why the Act should not have full effect in the case of independent covenants.

H. W. R. WADE.

LEASE—OPTION TO PURCHASE FREEHOLD—RUNNING OF BENEFIT

Griffith v. Pelton [1957] 3 W.L.R. 522 is another decision concerning the transfer of the benefit of a covenant. But, in contrast to the *Pinerwood* case (above), the Court of Appeal cut through an undergrowth of technicality in order to allow the benefit to run with the covenantee's land. The case was governed by a different set of rules, for the covenant was contained in a lease, and was an option for the tenant to purchase the freehold.

By this covenant an option was given to "the lessee" to purchase the lessor's freehold reversion in case the lessor should die during the term of the lease, which was for twenty-one years from 1935. The lessor did in fact die in the final month of the term, but some years before then the original lessee had assigned the lease to the plaintiff, and it was the plaintiff who wished to enforce the option. His right to do so was disputed by the executrix, and no doubt an option at a fixed price granted in 1935 and exercisable in 1956 had become, by the debasement of currency, unexpectedly injurious to the estate. Had the benefit of the option passed to the plaintiff? The assignment itself made no reference to the option, but had merely assigned "the property comprised in and demised by the lease for the residue of the term thereby granted." But, three days before the end of the lease, and immediately before the plaintiff claimed to exercise the option, the original lessee made an express assignment of the benefit of the option in favour of the plaintiff "if and so far as not already vested in him." Furthermore, the lease defined "lessee" in the common way so as to include assigns where the context so admitted. Clearly, then, all had been done

that human power could do to ensure that the plaintiff should have the benefit of the option, except only that it had not been expressly assigned to him at the time of the assignment of the lease. The Court of Appeal refused to hold that this omission was any impediment. The interest of their judgment (delivered by Jenkins L.J., and affirming Vaisey J.) lies in the fact that they did not shelter behind the express assignment made at the last moment, but held primarily that the benefit of the option passed automatically to the plaintiff with the assignment of the lease. Secondly they held that, if it had not so passed, it passed by the express assignment. The plaintiff thus succeeded, and with a bowstring to spare.

The mainstay of the defendant's argument was the well-known decision in *Woodall v. Clifton* [1905] 2 Ch. 257, that an option to purchase the freehold (unlike an option to renew the lease) does not touch or concern the land within the meaning of the statute 32 Hen. 8, c. 34, as judicially interpreted ever since *Spencer's case*. The line of cleavage between covenants which do and do not touch or concern the land has always been somewhat artificial, but it expresses the principle that not every contractual provision can be turned into an interest in land, since interests in land must be of finite and familiar character. *Woodall v. Clifton* made it clear that an option to purchase the freehold reversion falls outside this class, so that it will not run with the land automatically at law. (It may run in equity, as an estate contract, but that point did not arise in *Woodall v. Clifton* for reasons explained in 19 Conv. (N.S.) 255.) Counsel therefore argued that, just as the burden would not run to the assignee of the reversion, so the benefit would not run to the assignee of the lease; and he was also constrained to contend, in order to attack the later express assignment, that if the benefit would not run under the general law, it could not be made to run by any act of the parties.

But the benefit of a contract is a very different thing from the burden, and can be dealt with in ways undreamed of in the philosophy of the sixteenth century. Equity and statute have rescued the law from its superstitious dread of assignable choses in action, and the benefit of a contract is in many cases now a piece of property transferable in its own right, quite apart from the law of land. So, in the present case, the benefit of the option was no less assignable because it was contained in a lease than it would have been if made independently. Therefore, failing all else, the express assignment would have been effective in the plaintiff's favour. But his position was held to be even stronger, in that the court construed the lease with the aid of the definition of "lessee," as implying that a mere assignment of the term should operate

automatically as an assignment of the benefit of the option also, so as to make it run to the assignee without express mention. Furthermore, there was an impressive body of judicial decisions and dicta to support the conclusion that in such a situation the benefit of the option would pass.

The one difficulty which faces the analyst is to explain how it is competent to the original parties to the lease to invent, *ex prius facto*, novel forms of transfer for the benefit of third parties. The benefit of a contract may be assigned expressly, it may devolve upon death, or bankruptcy, or if it touches or concerns the land it may run with land let on lease. But if all these doors are closed, what mode of transfer remains? Can a lease made between A and B itself really amend the general law as to how B may assign a chose in action to C? The Court of Appeal do not squarely face this obstacle. But they quote the opinions of Lords Haldane and Atkinson in *Batchelor v. Murphy* [1926] A.C. 63 which suggest that their Lordships would have faced it, had it been necessary, and would have found a different solution: they would have held that an assignment of "the lease" or any similar expression would have passed to the assignee all the assignor's assignable rights under the instrument of demise, whether or not they touched or concerned the land. Thus it would be by construing the assignment, rather than the original lease, that the problem would be solved, and no puzzles as to third parties would present themselves. It is submitted that this is also the correct interpretation of *Re Adams and the Kensington Vestry* (1884) 27 Ch.D. 394, upon which the Court of Appeal relied; and that, in the present case, the original lease was relevant only in showing that the lessor had entered into an assignable option. Whether there then was or was not an effective assignment to the plaintiff was surely a matter which the lease itself could not predetermine, except in the negative sense that it could limit the lessor's liability. In default of that, the scope of the assignment can be determined from the assignment alone.

H. W. R. WADE.

SOME JUDGES AND CHANCELLORS
WHO MADE NOTABLE CONTRIBUTIONS TO THE DEVELOPMENT
OF ENGLISH LAW OR ITS LITERATURE

H. A. HOLLOND

THESE notes on thirty-six judges and chancellors, prompted by memory of my own requirements fifty years ago, were prepared for distribution on stencilled sheets to the students attending my lectures on legal history at the Inns of Court. My aim was to provide both indications of the principal achievements of each of the lawyers named, and also references to readily accessible sources of further knowledge.

The editor of this journal has kindly suggested that it would be useful to its readers to have my notes available in print.

It is not nearly as difficult as it used to be for beginners to find out about the great legal figures of the past. Sir William Holdsworth, Vinerian professor at Oxford from 1922 to 1944, placed all lawyers in his debt by his book, *Some Makers of English Law*, published in 1938. It was based on the Tagore lectures which he had given in Calcutta.

Sir Percy Winfield, Rouse Ball professor at Cambridge from 1926 to 1943, gave detailed information as to the principal law books of the past and their editions in his manual *The Chief Sources of English Legal History* (1925) based on lectures given at the Harvard Law School. Twenty-four of my judges and chancellors have entries in his book as authors.

By far the most numerous of my references are to Holdsworth's monumental *History of English Law*, in thirteen volumes,¹ cited as H.E.L. The other works most referred to are *The Dictionary of National Biography* cited as D.N.B.; *Fourteen English Judges* (1926) by the first Earl of Birkenhead, L.C. 1919-1922; and *The Victorian Chancellors* (1908) by J. B. Atlay.

Although I have not cited them I may usefully mention these well-known collections of legal "Lives": *The Judges of England to 1864*, in nine volumes, by Edward Foss (d. 1870); *The Lives of the Chancellors*, by John, Lord Campbell, C.J.Q.B., 1850-1859, L.C. 1859-1861; and the *Lives of the Chief Justices* by the same author.

¹ A fourteenth, and final volume, based on manuscripts left by him, is in course of preparation.

1. c. 1205–1268. *Bracton* (as Henry of Bratton is always called) was a Devonshire man, who often served as a justice.

His Latin treatise, *De Legibus Angliae*, unfinished, is about ten times the size of *Glanville*.² He made great use of the plea rolls, particularly those of Martin of Pateshull (c. 1220–1230), and William of Raleigh (c. 1230–1240). At what period of his life he worked on his book is uncertain, he certainly did not do so after 1256. H.E.L. II 232–234.

He used extensively two Roman law manuals (called *Summae*) by Azo (d. 1230) the leader of the Law School of Bologna in Italy. Maitland gave an account of this in S.S. (Selden Society) Vol. 8. For Holdsworth's estimate of the English and Roman elements respectively in the *De Legibus* see H.E.L. II 271–286. The *De Legibus* was badly edited and translated by Sir Travers Twiss in the nineteenth century. There is a modern edition, without translation, by the late Professor Woodbine of Yale. As this edition is out of print the Selden Society proposes to republish it in facsimile with a translation by a group of scholars supervised by Professor S. E. Thorne of the Harvard Law School.

Bracton's Note Book—known by this name which was given to it by Maitland, who edited it with a brilliant introduction—is a collection of cases extracted by or for Bracton from the plea rolls for use in writing his great treatise. A manuscript of it in the British Museum was identified by Vinogradoff in 1884.

An account of the present state of Bractonian scholarship is given by Professor Plucknett in his book *Early English Legal Literature*.³

2. c. 1255–1292. *Robert Burnell* was Edward I's Chancellor from 1274–1292. He was elected Bishop of Bath and Wells in 1275. He had attached himself to Edward when Prince, and was one of the regents between Henry III's death in 1272 and Edward's return from Palestine in 1274. The parliament of 1283 was held at his home, Acton Burnell, in Shropshire. The great days of Edwardian legislation ended with Burnell's life: one can be sure, as Professor Plucknett is, that much of the credit for it must be given to him. Plucknett, *Legislation of Edward I*, p. 161; H.E.L. II 292–293.

3. c. 1240–1311. *Ralph de Hengham* was C.J.K.B. from 1274 until his dismissal in 1290. There had been numerous judicial scandals which led to dismissals of judges in 1289 and 1290. H.E.L.

² *Glanville* is the name by which a Latin treatise (c. 1189) *De Legibus Angliae*, of about 45,000 words, is called, because the author describes it as composed while Ranulf Glanville was Justiciar. See p. 163 of Vol. I of Pollock and Maitland's *History of English Law before Edward I* (2nd, 1898, ed.). This great classic was written almost entirely by F. W. Maitland, Downing Professor at Cambridge (d. 1906). It is generally cited as P. & M.

³ To be published shortly by the Cambridge University Press.

II 294-299. He was heavily fined: it is improbable that the tradition that his fine was used to build a clock tower in Westminster is true. He was restored to favour in 1299, and was C.J.C.P. 1301-1309. He held many ecclesiastical preferments in several dioceses. He took part in the drafting of parts of the Statute of Westminster II. He was the author of *Summa Magna* and *Summa Parva*, two tracts dealing with procedure in "real" actions, and possibly of some other tracts. H.E.L. II 323. There is a biographical sketch in Professor Dunham's edition of the *Summae* (1932).

4. c. 1395-1479. *Sir John Fortescue*, C.J.K.B. 1442-1461, was a stout Lancastrian, who went into exile in France with Queen Margaret. There he wrote the Latin book *De Laudibus Legum Angliae* for the instruction of her son Prince Edward, who was killed in 1471. There is a modern edition (1942) by Dr. S. B. Chrimes, with translation. It is well worth while to read the accounts of jury trial in Chaps. 25-32, and of the Inns of Court and the Serjeants-at-law in Chaps. 49 and 50. He also wrote *De Natura Legis Naturae* and *Monarchia* or *The Governance of England*. H.E.L. II 566-571.

5. 1422-1481. *Sir Thomas Littleton*, J.C.P. 1466-1481, wrote one of the masterpieces of technical legal literature, entitled *Tenures*, in French. It is best known in the English version, by an unknown translator, round which Coke wrote his *First Institute* as a commentary. The first printed edition of the *Tenures* was in 1481 or 1482. It was one of the earliest books printed in London, and the earliest treatise on English law printed anywhere. H.E.L. II 571-576.

6. 1470-1538. *Sir Anthony Fitzherbert*, J.C.P. 1522-1538, produced three works of distinction. Winfield rightly describes him as "one of the towering figures in the history of English legal literature," p. 224. H.E.L. IV 115-116, and see index.

(i) The *Graunde Abridgment* containing summaries in French of 14,000 cases or points from cases, mostly, but not all, out of the Year Books. It was published by John Rastell in 1516, who also issued in 1517 a table of contents prepared by himself and Fitzherbert. See 9 below.

(ii) The *Natura Brevium* (cited as F.N.B.), also in French, was published in 1534. It is a selection of writs with commentary. The classic edition is that of 1730, in English, with annotations by Sir Wadham Windham (a seventeenth-century judge), and by Sir Matthew Hale. It was at first called the *New Natura Brevium* to distinguish it from an anonymous fourteenth-century *Natura Brevium*.

(iii) *L'office et auctoryte des Justyces de pees* printed by Redman in 1538. This was the leading work on justices of the peace before *Eirenarcha* (1581) by William Lambarde.

The common statement that Fitzherbert also wrote the *Book of Surveying* and the *Book of Husbandry* has been proved erroneous. They were written by his elder brother, John. Putnam, Vol. 7, *Oxford Studies in Social and Legal History*, p. 32.

7. 1478–1535. *Sir Thomas More* became L.C. in 1529 during the life of his father Sir John More, J.K.B. He resigned in 1532. He was convicted of alleged treason for refusing to take any oath impugning the pope's authority, and was beheaded. In 1935, after the established procedure, the Pope declared him a Saint.

Holdsworth wrote that "the result of his tenure of office was to restore harmonious relations between the court of Chancery and the common law courts for the next half century. It is for these reasons that he must be regarded as the second of the founders of the English system of equity." (Holdsworth regarded St. Germain as the first of the founders), *Some Makers*, pp. 95–99. H.E.L. V 223, 341–342.

More was a voluminous author on religious and historical subjects. His *Utopia*, written in Latin 1515–1516, became famous throughout Europe.

8. c. 1500–1558. *Sir Robert Brooke* (Broke in D.N.B.) became C.J.K.B. in 1554. His *Abridgement* was based on Fitzherbert's, but is even larger. "It contains much new matter: in particular it abridges fully the Year Books of Henry VII's and Henry VIII's reign." H.E.L. II 545. It was published posthumously in 1568.

Winfield (p. 233) quotes from William Fulbeck's *Direction to the Study of the Law* (1600): "Master Brooke is more polite, and by popular and familiar reasons hath gained singular credit, and in the facility and compendious form of abridging cases he carrieth away the garland. But where Master Fitzherbert is better understood he profiteth more, and his Abridgment hath more sinews though the other hath more veins."

9. 1508–1565. *William Rastell*, nephew of Sir Thomas More, became J.Q.B. in the last year of Mary's reign, 1558, and remained in office, though a Catholic, until the end of 1562, when he resigned. But his eminent services to the law were in rendering legal sources available in print. In 1531 he issued from his father's printing press the text of a current *Register of Original Writs* and a *Register of Judicial Writs* in a single volume.

In 1557 he published, from the press of Richard Tottell, *A Collection of all the Statutes from the beginning of Magna Carta unto the year of our Lord 1557*. This became the best known of

the early collections; it was frequently reprinted with additions bringing it up to date.

In 1564 he published his *Liber Intrationum* (Book of Entries), i.e., precedents of pleadings in the form in which they were to be entered on the roll. H.E.L. IV 311; V 380, 384.

John Rastell (d. 1536), William's father, was prominent both as a barrister and as a printer. He printed Fitzherbert's *Graunde Abridgment*, and helped with the preparation of a *tabula* for it. He also compiled our first law dictionary, later editions of which were called *Les termes de la Ley*. He married Elizabeth More, sister of Sir Thomas More. H.E.L. V 401.

10. 1512–1582. Sir James Dyer became C.J.C.P. in 1559. His reports (published after his death) contain some cases dating from before his birth, but as a regular series they cover 1539–1582. There were six editions in French: the first English one is by John Vaillant, 1794. H.E.L. V 347, 348, 364.

11. 1540–1617. Lord Ellesmere is the name by which Thomas Egerton is best known; he was created Viscount Brackley shortly before his death.

He was L.K. 1596–1603, and L.C. 1603–1617. He was a reformer of procedure in the Star Chamber and Chancery, and left MSS on the subject which disappeared in the seventeenth century.

He published at the King's command his speech in *Calvin's Case*, which decided that a person born in Scotland since the accession of James I to the crown of England was not an alien in England.

We also have a report of his judgment in the *Earl of Oxford's Case*, one of the cases which led to the conflict with Coke in 1616. H.E.L. V 231.

12. 1552–1634. Sir Edward Coke is the greatest of English Chief Justices. He was a man of immense learning and industry, and great courage, but he was violent and unscrupulous in his attacks on opponents and accused persons.

He was S.-G., A.-G., C.J.C.P. 1606–1613, C.J.K.B. 1613–1616. 1616 was the critical year of his career. He challenged the right of the Lord Chancellor to issue injunctions against parties pursuing their rights at common law. The dispute was referred by James I to a committee, which reported in favour of Chancery, and James I made a pronouncement accordingly. Coke also made a stand against James's attempt to interfere by prerogative with the progress of a case. (*The Case of Commendams*.) This incident led to his dismissal. When over seventy

he embarked upon a parliamentary career and was one of the leaders in the struggle for the Petition of Right.

As a legal author Coke is in the front rank. Besides his *Reports* he produced four *Institutes*. The *First*, commonly called *Coke upon Littleton* (1628), though in form a commentary on Littleton's *Tenures*, is in fact a shapeless agglomeration of legal doctrines. Later editions were annotated by Hale and Nottingham. The classic edition is that of 1787, begun by Francis Hargrave (c. 1741–1824), and finished by Charles Butler (1750–1830). It incorporates Hale's and Nottingham's notes. The *Second Institute* is a commentary on thirty-nine statutes relating to public law; the *Third* is on criminal law; the *Fourth* on the jurisdiction of courts.

Coke published Parts I to XI of his *Reports* at intervals between 1600 and 1615. Parts XII and XIII are of less authority because they were not revised by him, and were published after his death. His treatment of cases was not uniform. Sometimes he makes a case a peg on which to hang irrelevant disquisitions. But the authority of the reports was regarded as supreme, and they were cited as "Rep." (Reports).

H.E.L. V 425–456; Birkenhead, 26. There is a colourful biography by the American writer Mrs. Catherine Drinker Bowen, entitled *The Lion and the Throne* (1957, Hamish Hamilton).

13. 1561–1626. *Sir Francis Bacon* is best known as Bacon; often erroneously as Lord Bacon. His titles were Lord Verulam and Viscount St. Albans. He became L.K. in 1617 and L.C. in 1618. In 1621 he was impeached for taking presents, confessed, and was heavily fined.

He became, and has remained, world-famous for his *Essays* and for his contribution to the theory of scientific method. His legal writings (*Reading on the Statute of Uses*; *Maxims of the Law*; and *Legal Aphorisms*) are not extensive but are of first rate quality. H.E.L. V 238–254. Birkenhead, 1.

14. 1589–1656. *Henry Rolle*, though a member of the Parliamentary Party, was appointed a judge of K.B. in 1645 and C.J. in 1648. He served under the Commonwealth until 1655. He was a member of a group of literary lawyers, including John Selden. His friend, Hale, wrote an introduction to his *Abridgment*, posthumously published. Rolle's *Abridgment* improved on the older ones by classifying topics, and by including summaries of parliamentary records and statutes. It was thus a step in the direction of eighteenth-century *Abridgments* such as the *Digest* compiled by Comyns, and that begun by Gilbert. Rolle also wrote some reports. H.E.L. V 375–377.

15. c. 1606–1674. *Sir Orlando Bridgman* was a royalist conveyancer. He was C.B. for a few months in 1660, and presided over the trial of the regicides. He was then C.J.C.P. 1660–1667, and L.K. 1667–1672. His *Precedents of Conveyances* (1682), published after his death by his clerk, were so important that he came to be regarded as the father of modern conveyancing. H.E.L. VI 537, 552, 605.

16. 1609–1676. *Sir Matthew Hale* (1609–1676) was C.B. 1660–1671, and C.J.K.B. 1671–1676. He was the leading judge of his day, who rivalled Coke in knowledge of the common law, but was also a student of Roman law. His *History of the Common Law*, though fragmentary and published long after his death, went into six editions. He also wrote *Jurisdiction of the Lords' House* and *History of the Pleas of the Crown*. H.E.L. VI 574–580. Birkenhead, 52.

17. 1621–1682. *The Earl of Nottingham* (*Heneage Finch and then Lord Finch*) was L.K. 1673–1675, L.C. 1675–1682. He began the work of systematising the principles on which the Court of Chancery acted—work which caused him to be described as the Father of Modern Equity. His best known cases are (a) *Cook v. Fountain*, 1676, in which he classified trusts, and (b) the *Duke of Norfolk's Case*, 1682, affirming the validity of a settlement drawn by Sir O. Bridgman, which laid the foundation of the Rule against Perpetuities. The settlement was one of leaseholds in favour of Henry, second son of the Earl of Arundel, subject to the proviso that if Henry should succeed to the earldom the lands should go to the third son, Charles. It was held valid because it must “wear out within the compass of a life.” Nottingham's decree was reversed by his successor Francis North, Lord Guilford, but was restored by the H.L. in 1685.

A number of writings by Lord Nottingham exist in MS., notably many reports of cases. These are being published by the Selden Society (1st Vol. 1957), edited by Mr. D. E. C. Yale, Fellow of Christ's College, Cambridge. There is also a treatise on Equity practice, which Mr. Yale will also publish. H.E.L. VI 539.

18. c. 1620–1683. *Sir Edmund Saunders* was C.J.K.B. for a few months in the last year of his life. His reports concentrated on the law of pleading. He gave the pleadings in full in Latin of each case which he reported. The first edition of his reports was in French (1686); the second in English (1722). In 1799 Serjeant John Williams produced his well-known edition, translating the pleadings into English, and adding his own notes. It was much used in the nineteenth century: cited as *Williams' Saunders*. H.E.L. VI 503–504, 564–567.

19. 1642–1710. *Sir John Holt* was C.J. of the King's Bench or Queen's Bench under William and Mary, William III and Anne from 1689 until his death. He twice refused the Chancellorship. Though never a peer, he is often referred to as Lord Holt. He is in the very front rank of judges: few have taken part in as many leading cases: some of these, especially in the law of tort, are still cited from time to time. He began the policy of incorporating into the common law the practice of merchants. H.E.L. VI 263–272, 516–522, 634–640. Birkenhead, 99.

20. 1651–1716. *Lord Somers (John Somers)* was L.K. 1693–1697, L.C. 1697–1700. He was politically very prominent, but also a very able lawyer. He delivered a celebrated judgment in *The Bankers' Case*, 1696, relating to the scope of the remedy by Petition of Right. After he was driven from office by political faction he prepared a bill for the amendment of the law in a great variety of matters. After mutilation in the House of Commons it became the Act 4 & 5 Anne, c. 16, 1706. H.E.L. VI 535–537; XI 519–527. Birkenhead, 121.

21. 1674–1726. *Sir Jeffrey Gilbert*, C.B. 1725–1726, was a pioneer in the writing of legal monographs, many of which were published after his death, and ran into many editions. The best known are *Uses and Trusts*, *Ejectments and Distress*. He also left the unfinished MS. of an *Abridgment*, which was continued by Matthew Bacon, an Irishman (d. 1759), and finished by others. It was published under the title *Bacon's Abridgment*. H.E.L. XII 169.

22. 1673–1733. *Lord Raymond (Robert Raymond)* was C.J.K.B. 1725–1733—the second C.J. to be created a peer. (The first was the infamous George Jeffreys, 1648–1689.) Lord Raymond is remembered by his reports, produced at a time when good law reporting was rare. He was the son of Sir Thomas Raymond, also a judge and author of reports. H.E.L. VI 559–560.

23. 1667–1740. *Sir John Comyns*, C.B. 1738–1740, wrote in Law-French a Digest which was published in an English translation in five volumes, 1762–1767. It was regarded as of high authority, for Comyns was reputed the ablest lawyer among his contemporaries. He also wrote some reports. H.E.L. XII 168.

24. 1690–1764. *The Earl of Hardwicke (Philip Yorke)* was C.J.K.B. 1733–1737 and L.C. 1737–1756. He contributed more than any other eighteenth-century chancellor to the building up of a consistent system of Equity. Many of his decisions were included by F. T. White and O. D. Tudor in their *Leading Cases in Equity*, published in 1849.

In 1753 Hardwicke promoted the Marriage Act called after him

(26 Geo. 2, c. 33), which ended the scandal of so-called "Fleet marriages." H.E.L. XII 237-297. Birkenhead, 143.

25. 1705-1793. *The Earl of Mansfield* (Hon. William Murray) was C.J.K.B. 1756-1788, having served as a Law Officer for fourteen years. He completed Holt's work of incorporating mercantile custom into the common law. He laid the foundations of the law of negotiable instruments and the law of marine insurance.

He is best known to students for his heretical views on "consideration." H.E.L. XII 464-560. Birkenhead, 168. Mr. C. H. S. Fifoot, Fellow of Hertford College, Oxford, has written a valuable monograph on Mansfield's work (1936).⁴

26. 1723-1780. *Sir William Blackstone* was a judge of the C.P. 1770-1780. He was a Fellow of All Souls College, and became its bursar. At William Murray's suggestion he gave lectures on common law at Oxford, the first ever given at either university. He lectured from 1753 to 1758 as a free-lance, and was then the first Vinerian Professor until 1766. He published his lectures under the title *Commentaries on the Laws of England* in four volumes, 1765-1769. H.E.L. XII 702-737. Birkenhead, 197.

27. 1746-1800. *Sir Francis Buller* was Mansfield's favourite puisne judge. He was appointed a judge of the K.B. at the age of 32. In 1767 he published a well-known book *Trials at Nisi Prius*, based on a work by his uncle Henry Bathurst, L.C. 1771-1778. It reached a seventh ed. in 1817. H.E.L. XII 354, 488.

28. 1745-1836. *Lord Stowell* (William Scott) was a judge of the High Court of Admiralty 1798-1828. Previously he had been Fellow and Tutor of University College, Oxford. He sat in the House of Commons 1790 to 1821, when he was created a peer.

The long naval wars enabled him to build up Prize Law. Viscount Sumner (1859-1934) wrote (as J. A. Hamilton) in the D.N.B.: "for a generation he was rather a lawgiver than a judge in the ordinary sense of the term: upon many maritime points his judgments are still the only law." H.E.L. XII 668-689.

29. 1751-1838. *The Earl of Eldon* (John Scott) was the younger brother of William Scott, and was with him for a short time a Fellow of University College, Oxford. He was C.J.C.P. 1799-1801, and L.C. 1801-1806, 1807-1827. His long tenure enabled him to complete the systematising of Equity. All agreed as to his industry, his intellect and his courtesy to counsel. But his conscientiousness and habits of doubt led to mounting arrears,

⁴ Beginners are warned against confusing Lord Mansfield with Sir James Mansfield, C.J.C.P. 1804 to 1814. The latter, a son of J. J. Mansfield, an attorney, changed his surname to Mansfield when a young man. D.N.B.

and his obstructiveness to all reform was notorious. H.E.L. XIII 595-638. Birkenhead, 224.

30. 1778-1868. *Lord Brougham and Vaux (Henry Brougham)* was L.C. 1830-1834 during the Whig Governments of Lord Grey and Lord Melbourne. He was remarkably versatile intellectually and a great advocate. But he was so eccentric and unreliable as a colleague that Melbourne, on returning to power in April 1835 after Peel's four months' ministry, refused to reappoint him chancellor.

Brougham is remembered for his defence of Queen Caroline in 1820; for his six hours' speech in the House of Commons on February 7, 1828, on the common law; for his advocacy of the Reform Bill, 1832; for his creation of the Judicial Committee of the Privy Council (1833); and for three Evidence Acts. He was one of Bentham's favourite disciples, and a keen promoter of popular education. H.E.L. XIII, see references in App. II. Atlay, I 168.

31. 1779-1861. *Lord Campbell (John Campbell)* entered public life late. He was Chairman of the Real Property Commission 1828; S.-G. 1832; A.-G. 1835-1841; L.C. of Ireland June-August 1841. Being then out of office he embarked at the age of sixty-three on writing the *Lives of the Chancellors* which, though open to serious criticism, had an enormous sale. He also wrote *Lives of the Chief Justices*.

As a legislator he had a chief part in the preparation of the Municipal Corporations Act, 1835, which he carried through the House of Commons. Later he was largely responsible for the Copyright Act, 1842; and he promoted three Acts each of which is known as Lord Campbell's Act: on Libel, 1843, on Fatal Accidents, 1846, and on Obscene Publications, 1857.

In 1850 he undertook, at the age of 70, both the Chief Justiceship of the Q.B. and the Chairmanship of the Divorce Commission which led to the Act of 1857.

In 1859 he became L.C.; in 1861 he died in office. Atlay, II 127. D.N.B.

32. 1781-1875. *Lord St. Leonards (Edward Burtenshaw Sugden)* was L.C. of Ireland 1834-1835, and 1841-1846, and L.C. of Great Britain February-December 1852. At the age of twenty-one he published a small book *A brief conversation with a Gentleman of Landed Property about to buy or sell lands*. His best known later treatises (which brought him large sums) were *The Law of Vendors and Purchasers*, 1805, 14th ed. 1862; and *Practical Treatise on Powers*, 1808, 8th ed. 1861. Atlay, II 1.

33. 1812-1895. *The Earl of Selborne (Roundell Palmer)* was L.C. 1872-1874 and 1880-1885. He was the principal architect of the Judicature Act, 1873; most of its drafting was, he wrote, by

himself. In 1867, as ex-A.-G., by his speeches in the House of Commons he had promoted the appointment of the Judicature Commission. Lord Cairns, then L.J., was its Chairman: Palmer an active member. In an essay, published in 1887 as a chapter in *The Reign of Queen Victoria; a survey of 50 years of progress*, reprinted in Vol. I of *Selected Essays in Anglo-American Legal History*, Lord Bowen (1835-1894) wrote: "To the co-operation for the public weal of Lord Selborne and of the late Lord Cairns—rivals in politics but fellow-workers in the reform of the law—is chiefly due the completeness of the contrast between the judicial systems of 1887 and of 1837."

Selborne as Chairman of the Rules Committee was responsible for the production in 1883 of a revised code of Orders and Rules of the Supreme Court. He was created an Earl when the present Royal Courts of Justice were opened in 1882. Atlay, II 377. D.N.B.

34. 1819-1885. *Earl Cairns (Hugh McCalmont Cairns)* was L.C. February-December 1868, and 1874-1880. As S.-G. in 1858 he promoted the Act known as Cairns' Act, which enabled issues of fact to be tried by a Court of Chancery. He was A.-G. 1866-1867, but found the strain too great and when a Lord Justiceship of Appeal in Chancery fell vacant he retired to it, and was created a peer. He was appointed Chairman of the Judicature Commission, and was L.C. when the Judicature Act Amendment Act, 1875, and the Appellate Jurisdiction Act, 1876, were passed. Jessel M.R., a very great judge, described Cairns as the greatest lawyer of his time, and Disraeli said that he was "great in council." Atlay, II 292; Birkenhead, 278.

35. 1829-1894. *Sir James Fitzjames Stephen*, who was a judge of the High Court 1879-1891, had great intellectual power with a special gift for draftsmanship. As legal member of the Council in India, 1869-1872, he was responsible for many measures, especially the Code of Criminal Procedure and the Evidence Act of 1872. On return to England he published three works of great authority, his *Digest of the Law of Evidence*, his *Digest of Criminal Procedure*, and his *Digest of Criminal Law*. In 1878 a Criminal Law Commission was appointed, including Lord Blackburn as Chairman and Stephen as a member, to consider a draft Criminal Code prepared by Stephen. The Commission reported favourably, but no time was ever found to enact the code. In 1883 Stephen published his classic *History of the Criminal Law* in three volumes. Birkenhead, 299. Dr. L. Radzinowicz, Fellow of Trinity College, Cambridge, delivered in 1957 an interesting Selden Society Lecture on Stephen: it is being published by the society.

36. 1823–1921. *The Earl of Halsbury (Hardinge Stanley Giffard)*, L.C. June 1885–February 1886, August 1886–August 1892, June 1895–December 1905. His contributions to the judicial work of the House of Lords during his long membership of it were very great. Politically he was a die-hard. He will long be remembered by the great encyclopaedia, publication of which under his general editorship was begun by Messrs. Butterworth in 1907. It is known as *Halsbury's Laws of England*, and of it Lord Birkenhead wrote (at p. 325) that, though of course it was not written by him, he read every page as it was passing through the press and the work gained much from his criticism and advice. Birkenhead, 327; Atlay, II 433. The second edition was by the first Viscount Hailsham, L.C. 1928–1929, 1935–1938: the third, in progress, is by Viscount Simonds, L.C. 1951–1954, now a Lord of Appeal in Ordinary.

RANULF DE GLANVILL AND HIS CHILDREN *

S. J. BAILEY

§ 1. INTRODUCTION

IN the Pipe Rolls for the financial year 1163-1164, Ranulf de Glanvill appears as sheriff of Yorkshire.¹ This was an important office, not to be reached, one may suppose, without previous experience in the King's service,² and he continued to hold it for many years. Presumably it was a lucrative office,³ for it necessarily implied duties far away from Suffolk, the county in which his closest associations lay. His father, Hervey de Glanvill,⁴ and his

* This article contains some pages of an intended monograph, not yet completed, upon Glanvill's lands. It is, in a sense, a sequel to "The Countess Gundred's Lands" (10 Camb.L.J. 84-103), in which I attempted to trace the lands and family of Glanvill's brother, Roger, and of Gundred, his wife. The following abbreviations are used: B.N.B. (*Bracton's Note Book*, ed. Maitland); C.R.R. (*Curia Regis Rolls*, published by H.M. Stationery Office); D.N.B. (*Dictionary of National Biography*); E.H.R. (*English Historical Review*); E.Y.C. (*Early Yorkshire Charters*); P. & M. (Pollock and Maitland); P.R.S. (*Publications of the Pipe Roll Society*, first series); N.S. (same, new series); R.C.R. (*Rotuli Curiae Regis*, ed. Palgrave).

¹ 7 P.R.S. 11 (Randulf de Glanvill). At first he is usually Randulf or Rannulf. In and after 1183-1184 he is usually Rannulf or Ranulf.

² 1 P. & M. 141; Morris, *The Medieval English Sheriff*, 113.

³ See Morris, *op. cit.*, Chap. 10 and *passim*, for the obscure problem of the rewards of the sheriff's office. If we ignore extortion and misappropriation (*ibid.*, 277-282), and the sheriff's aid (which perhaps ceased to be an emolument in the year Glanvill took office—*ibid.*, 114), the main legitimate sources of income seem to have been the chattels of condemned thieves (Glanv. VII. 17), perquisites in the way of hospitality (Morris, *op. cit.*, 282) and, in so far as they exceeded the annual "ferm" which he paid to the exchequer, the revenues from the King's estates, etc., and the judicial income (*e.g.*, amercedments—see Glan. IX. 10) of the local courts (Morris, *op. cit.*, 114, 276-283). See also footnote 13, *post*.

⁴ 1 C.R.R. 433; Plac.Abr. 67, *s.c.* See also *Calendar of Charter Rolls*, i. 46, where Hervey de Glanvill is a witness (next after "Henry my nephew") to a charter, *temp.* Henry I, whereby Stephen, Count of Mortain, granted a manor in the Honour of Eye. In 39 E.H.R. 569-571, Dr. Cam has printed a contemporary record of a Shire-moot of the counties of Norfolk and Suffolk, held at Norwich *circa* 1150 A.D., where the Abbot of (Bury) St. Edmund's claimed that any man belonging to his eight and a half hundreds should be tried in the abbot's court—even for treason. King Stephen consented, subject to proof of the privilege before his justice and the shire. The speech of Hervey de Glamuyle [*sic*], in which he spoke of the fifty years during which he had attended shire and hundred courts—at first, before he became a tenant, in the company of his father—and claimed to remember many things earlier even than the reign of King Henry, persuaded the bishops, barons, sheriffs and others that the abbot's claim was duly established. The list of notabilities then present concludes with the two sheriffs and Hervey fitz Hervey and Robert de Glamuille—who was presumably (see (1949) 10 C.L.J. 94, 99) Ranulf de Glanvill's brother. More of this shire-moot and of the abbot's court at Catteshall may be found in Dr. Hurnard's article, "The Anglo-Norman Franchises," 64 E.H.R. 289, *e.g.*, at pp. 324-325.

forebears since the conquest of England,⁵ had held lands in Suffolk; his own lands lay chiefly in that county; and it is said that he was born there, in the vill of Stratford, during the reign of Henry I.⁶

Glanvill's first period as sheriff of Yorkshire lasted for six years. Then, after an interval of six years, he resumed that office in the year 1175 and retained it until King Richard's accession in 1189.⁷ During that six years' interval, it was held by Robert de Stutevill, a great Yorkshire baron. His son and heir, William de Stutevill, married Glanvill's sister, Berta; and Glanvill gave to them some Yorkshire land which he had purchased for her *maritagium*.⁸

It need not be supposed, I think, that Glanvill was out of favour during the period 1169-1175, for the Pipe Rolls of those years show that he was holding other responsible administrative appointments⁹ and, sometimes, there are records of allowances made to

⁵ Maitland, D.N.B., s.t. "Glanville, Ranulf de." The Domesday tenant—presumably Herve's father (see preceding footnote)—was a Robert de Glanvill holding chiefly of Robert Malet and of William de Warenne: *Domesday*, ii, ff. 304b, 308-309, 400-400b.

⁶ 6 *Monasticon* 380; Campbell, *Lives of the Chief Justices*, i, 19. C. T. Clay, in 5 E.Y.C. 236, suggests that he was born circa 1120-1130. Professor Beale suggested 1130 A.D.: Introduction to Beames' *Glanville*, p. iii. Maitland, D.N.B., says that this vill of Stratford was Stratford St. Andrew, near Saxmundham. The geography of Robert de Glanvill's Domesday holdings (see previous note) certainly seems to give that Stratford preference over Stratford St. Mary, on the southern boundary of Suffolk near the Stour estuary. It may be that Glanvill himself held lands in Stratford St. Andrew. Dickens, *Register of Butley Priory* (1510-1535), 12, asserts this and surmises that they were among the lands with which Glanvill endowed Butley Priory which he founded in Suffolk. In 6 *Monasticon* 382, the income of Butley Priory, temp. Hen. VIII, includes some £6 p.a. from Stratford lands; see also Dickens, *op. cit.*, 12. Blomefield's *History of Norfolk* (2nd ed.), xi, 189, indicates that a William de Aubervill (who was evidently Glanvill's grandson of that name, not his son-in-law as there stated) gave to Butley Priory the Stratford lands, with other lands and with churches (which included West Somerton) by fine in 20 Hen. III. Perhaps, however, these Stratford lands had formerly belonged to the hospital which Glanvill had founded in West Somerton, in Norfolk, and William was merely concurring in some rearrangement between that hospital and the priory. In 6 *Monasticon* 769, Glanvill is said to have placed the hospital under the government of Butley Priory; moreover, the Butley records listed, *ibid.*, 379n., include a "fine of divers counties" which, dated 21 Hen. III, concerned, *inter alia*, the advowson of West Somerton.

⁷ For the year 1169-1170, Robert de Stutevill accounts for the current farm of the county and Glanvill for past arrears: 15 P.R.S. 35-36. For the year 1175-1176, Glanvill accounts for the current farm and Robert for arrears: 25 P.R.S. 99. In the Pipe Roll for 1 Ric. I, p. 75, Glanvill is still sheriff; but he is neither sheriff nor charged with any arrears thereafter: e.g., 1 N.S. 58 *et seq.* The statement (e.g., in Poole, *Domesday Book to Magna Carta*, 389) that Glanvill was dismissed from office as a result of the Inquest of Sheriffs in 1170 is not necessarily supported by these dates, for on the face of them they suggest that he ceased to hold office in 1169.

⁸ See, e.g., *Rotuli Chartarum*, 54, where King John at his accession specifically confirms this together with all other gifts of land which William held in peace at the coronation of King Richard, who had himself confirmed them.

⁹ He held the farm of the honour of Lancaster (which had lands even in counties as remote as Suffolk) in the years 1172-1174: 22 P.R.S. 8-9. He was also custodian of the honour or Richmond or "Britanny" (which, primarily in Yorkshire, extended to many other counties including Cambs and Suffolk) in the years 1170-1183.

him, at the King's order, presumably on the ground that he was engaged upon the King's business.¹⁰ Then, in July 1174, he defeated the invading Scots at Alnwick and captured their King,¹¹ and it is said that both Robert de Stutevill and William de Stutevill served with him on this notable occasion.¹² From that time until King Henry's death in the year 1189, the rolls record increasing evidence both of Glanvill's responsibilities in affairs of State and of the King's favour.¹³ He is an itinerant justice in the year 1174-1175 and thereafter¹⁴; in 1183-1185 there are items about his expedition to the Welsh Marches¹⁵; he crosses the sea from Dover, at the King's expense, in 1175-1176¹⁶ and in each of the years 1185-1189¹⁷; and the year 1179-1180, in which he reached the supreme office of Justiciar (combining judicial with vice-regal powers),¹⁸ begins a series of innumerable writs issued in his name for the expenditure or remission of public moneys.¹⁹

¹⁰ In the roll for the year 1168-1169 the sheriff of Norfolk and Suffolk is credited, by the King's writ, with allowances to him of several small sums ranging from 10d. to 32s. 2d.: 13 P.R.S. 101, 104, 105. In 1171-1172 four sheriffs or farmers (at least three of them in East Anglia) are likewise credited with sums ranging from 16s. to £9 1s. 8d.: 18 P.R.S. 31, 38, 64, 117. The former, it seems, were his liabilities to contribute towards the amercements, etc., levied upon seven Hundreds wherein he held land; the latter were his liabilities (as sub-tenant in four Honours) for the scutages levied in respect of those knights who did not go, in person or by deputy, on the King's expedition to Ireland.

¹¹ 1 P. & M. 141; 1 E.Y.C. 304n.

¹² 1 E.Y.C. 391.

¹³ In 1177, for instance, Glanvill has held the farm of Westmoreland for three years and his steward, Reiner, renders its accounts at the exchequer: 26 P.R.S. 123. In 1180 the farm is mentioned again, only to record that Glanvill does not account for it "because the king has granted him those rents to sustain him in his service during the king's pleasure": 29 P.R.S. 76.

¹⁴ 22 P.R.S. (1174-1175), *passim*, s.t. *nova placita et novae conventiones*, in ten counties; see also 25 P.R.S. (1175-1176) *passim* and pp. 108, 138 (*justitiae errantes* in Yorkshire and Northumberland). After 1185 there are few such entries for Glanvill and some of them relate only to previous years. At this period, it seems, the word *placita* in the Pipe Rolls had not yet ceased to imply a penalty imposed in a court of law; see H. G. Richardson's introduction to 21 N.S. xxii-xxiv, xxxii: at first (*e.g.*, 1174-1176) Glanvill's usual colleague was Hugh de Cressi. In 1174, moreover, Glanvill was listed seventh of eight judges, headed by Richard de Luei, before whom an unprinted fine was levied: see F. J. West, *The Justiciarship in England* (a thesis deposited in Cambridge University Library), appendix A.

¹⁵ 33 P.R.S. 94-95, 154; 34 P.R.S. 155.

¹⁶ 25 P.R.S. 211.

¹⁷ 36 P.R.S. 193; 37 P.R.S. 205 (with the King and Prince John), 210; Pipe Roll of 1 Ric. I, p. 232.

¹⁸ Of the four earliest fines (dated 1180-1189) printed in 17 P.R.S., Glanvill is justiciar or justice in the first three: his last (no. 3) was levied at Oxford in January 1189; he is not in no. 4 (April 1189). He was named also, next after the bishops, in five of the six unprinted fines, for the period 1180-1186, listed by F. J. West, *op. cit.*: neither of the earlier two (dated 1180, 1181) gave him the title "justiciar." In 5 E.Y.C. 157, with three other justices at York *circa* 1187, he witnessed a charter as "*summa justicia*."

¹⁹ 29 P.R.S. *passim*. They end in the year 1189-1190. Such writs imply that, the king being absent from the realm, the justiciar is exercising vice-regal powers: 36 P.R.S., p. xvii. An unusual instance was an allowance from the rents and profits of the land of a deceased tenant in chief to the executors of his widow's will "to make its distribution": 33 P.R.S. 133-134.

He was still "Justiciar of England" at King Richard's coronation in September, 1189.²⁰ But, as Maitland has said, King Henry's friends had been Richard's enemies; and so, early in the following year, Glanvill crossed the sea to France for the last time and by October had reached Acre where, as a crusader, he died.²¹ His monument, as every lawyer knows, is that first great treatise on English law which bears his name. Whether in fact he had the leisure for writing such a book—for it was written some time during the last two years of his justiciarship—and whether he had even the leisure to discuss it in any detail with Hubert Walter, his kinsman (then dean of York and subsequently Justiciar), or with Geoffrey fitz Peter (a recently appointed King's justice and sheriff destined to become the third of the great lawyer-justiciars), either of whom may well have written it under Glanvill's name, are problems which remain unsolved.²²

Glanvill's wife was Berta, the daughter of Theobald de Valoines the elder.²³ She brought with her, as her *maritagium*, certain properties in Suffolk, where her father (lord of Parham) held five and a half knights' fees.²⁴ It is known that there were three daughters of the marriage—Maud, Mabel and Helewis²⁵: some writers have held that there were sons also. But much that has been written of the Glanvill family is unreliable and contradictory and the little that has been written of Glanvill's land is perhaps no better.²⁶ Recently, however, more material has become

²⁰ Itinerary of Richard I, 13 N.S. 4.

²¹ *Ibid.* 29, 38, 44: 1 P. & M. 142. It is said that he paid a heavy fine to recover the King's favour: see Poole, *Domesday Book to Magna Carta*, 351.

²² See 1 P. & M. 143; also Lady Stenton, in *Selden Society Publications*, Vol. 67, pp. 9-10, for the new suggestion that Geoffrey fitz Peter, rather than Hubert Walter, "was instructed or encouraged by his master, Glanville," to write or superintend the writing of the book.

²³ 6 *Monasticon* 380-381: 5 E.Y.C. 236-237. This Theobald should be distinguished from his grandson, Theobald de Valoines the younger, who had inherited his lands by *circa* 1178: *ibid.*, 234-237.

²⁴ These, together with three fees in Wood Ditton (Cambs) and a half fee in Yorks, he held of the honour of Richmond (or Brittany): 5 E.Y.C. 234 *et seq.*

²⁵ 6 *Monasticon* 381.

²⁶ Whereas Maitland (*D.N.B.*) was careful to write merely that he left three daughters and that much of the genealogical information contained in Glanville-Richards' *Anglo-Norman House of Glanville* is incorrect or very questionable, the latter (see pp. 45, 179-180) gives Glanvill and Berta two sons besides and makes one of them (and his children after him) inherit from Glanvill an earldom. See also Campbell, *Lives of the Chief Justices*, i, 35 (of his "numerous offspring only three daughters survived him . . . and he divided among them his vast possessions") and compare Beale's introduction to Beames' *Glanville*, p. vi (that he "left one son and three daughters whom he had already enriched from his great fortune"). J. H. Round's introduction to 35 P.R.S., p. xxiv, describes Glanvill's sister (Berta, who married William de Stutevill) as his niece, and his daughter (Helewis, who married Robert fitz Ralph) as his sister. Campbell, *op. cit.* 19, errs also in describing Glanvill's wife, Berta, as "heiress" of her father's "large possessions," and asserts that Glanvill "inherited" a considerable estate from his father.

available from the periods in which Glanvill, his children and his grandchildren were alive. There are now in print a collection, in ten volumes, of early Yorkshire Charters, many of them written whilst Glanvill lived, and, for official records, the Pipe Rolls to the year 1212 and the surviving rolls of the Curia Regis to the year 1220. These last, unfortunately, are not continuous and are of little help until the twelfth century is ending. Nevertheless, by studying these evidences together, in the light of other contemporary sources, we may hope to resolve some of the old uncertainties which have surrounded Glanvill's family and the devolution of his lands, and, at the same time, may see something of the land law as it stood in the reigns of King Richard and King John.

At this point something must be said of the Pipe Rolls and of the machinery for collecting the King's revenues.²⁷ These rolls, written at the close of each financial year by the treasurer's clerk at the exchequer, give the name of each person who was accountable to the crown in the year concerned, the amount he owed, the amount (if any) he has paid or been forgiven, and the debit balance (if any) to be charged against him in the following year. The rolls were primarily concerned with the sheriffs of the various counties. Each sheriff, as a rule, "farmed" his county (or two counties together, as Norfolk with Suffolk, Cambs with Hunts): that is to say, he collected the revenues there from the King's estates and from certain other sources, and owed the exchequer a fixed rent for the privilege of doing so. As a rule he was not a mere "keeper" of the county, accountable to the exchequer for the actual sums he had collected. As a rule, moreover, his fixed annual rent remained static even when the King's estates in the county were diminished. If, for instance, the King granted some of his demesne lands in that county to some favoured subject, the sheriff's rent remained nominally unaltered; but, under the heading "*in terris datis*," he would be credited with the rentable value of the lands whose rents he had thus lost. This is an important point for our purposes, for it means that we are likely to find in the Pipe Rolls, repeated year after year, any grant of land that Glanvill may have obtained from the King.

Sometimes, of course, the King's income in the county would increase. Some tenant, perhaps, has died without heirs or has forfeited his lands to the crown. Here, again, the sheriff's rent for the county as a whole is prone to remain unaltered. But now a

²⁷ Only a very bare outline is attempted here. See, generally, Poole, *Exchequer in the Twelfth Century*; and the introductions to N.S. Vols. 1, 11 and 21. The last of these by H. G. Richardson deals in detail with the financial machinery of our period and is of great importance.

new item will appear in the Pipe Rolls, probably under the sub-heading "*de purpresturis et escaetis*," and the sheriff (or perhaps some other man) becomes accountable as farmer or keeper, for additional moneys in respect of that. Then, as before, it may be that the King decides to give away some of the land that has thus accrued to him, and we are likely to see recorded in the Pipe Roll that he has done so and to whom.

So much for the King's grants *de novo*. But our rolls can tell us something more. Periodically, and indeed almost perpetually when Richard and John reign, there are levies of "scutage" (levied originally in respect of some specified military expedition) upon those tenants of the King who hold lands of him by knight service. And here the sums required of each tenant will depend, as a rule, upon the number of knights' fees that he holds: usually it is fixed at either 20s. or (in John's reign) two marks per knight's fee. These debts are entered in the Pipe Rolls against the names of the tenants concerned, with a statement of the amount (if any) that each has duly paid and, sometimes, even the number of fees that he holds.²⁸ In Richard's reign, moreover, we have similar entries in respect of the "aid" which was levied for his ransom; and, now and again, there is an aid for the marrying of a King's daughter. Such entries as these, taken over a long series of exactions, may reveal to us both the number (though not the locality) of the knights' fees that a certain man held direct of the King in a certain county and even perhaps—though this is a more hazardous speculation—the person to whom those knights' fees passed when he died.²⁹ There are, moreover, a number of published records of official inquiries as to the King's tenants, inquiries designed no doubt to ensure that his revenues should be maintained, which are helpful in the same way.³⁰ And occasionally, as we shall see, there is in the Pipe Rolls an entry recording that someone has paid the King a "relief," or has offered him an oblation, in order that he may obtain seisin of the lands of a deceased tenant whose heir he is.

So far, as will have been observed, there has been no hint that

²⁸ The Pipe Rolls do not tell how these tenants in chief reimbursed themselves by exacting their scutage from their own sub-tenants. But in fact they did so and could even obtain from the king the privilege of procuring the sheriff to distrain any such sub-tenants who had failed to pay them: see B.N.B., no. 333 (1229); also 11 N.S., p. xxiii.

²⁹ The Pipe Rolls do not specify the locality, within the county concerned, in which the lands lay.

³⁰ e.g., *Red Book of the Exchequer* and the *Book of Fees*: of these the latter often specifies the precise locality of the lands in question. The *Domesday Survey* is, on the whole, too early for our purposes. The immediate object of these inquiries was usually to ascertain what alienations or sub-infeudations had been made by the King's tenants-in-chief.

our Pipe Rolls will show anything of those who hold lands otherwise than as direct tenants of the King. Nor are we entitled to expect any such information, for the King was unlikely to obtain any revenues from the mere sub-tenants of his tenants in chief. Nevertheless, there are occasional entries about such persons—*e.g.*, in relation to scutage. If a tenant in chief or some of his own tenants had served the King in some special fashion, as in some military expedition, it was customary to remit scutage for that special case. Thus we may find, when X accounts as tenant in chief for the scutage due from him, that he is credited in the Pipe Roll for a part of it in respect of some other person named therein. And so we may deduce that this person is X's tenant and, perhaps, the size of his holding. Similar indications may be seen when the farmer or keeper of some substantial honour or barony (such as the honour of Eye or of Richmond), which has fallen for some reason into the King's hand, accounts at the exchequer for the scutage of its knights' fees.³¹

As the years passed, and the business of government grew more complicated, the number and variety of debits and credits entered in these rolls increased. For the most part, unfortunately, they are terse and uninformative, though even so they will sometimes serve to augment or explain puzzling information found elsewhere. One variety of entry, however, which was becoming increasingly frequent at the time of Glanvill's death, has a special significance for us. It was evidently founded upon the old rule that when a debtor dies the burden of his debt falls upon his heir.³² When a man died indebted to the King, the exchequer applied this rule very rigorously and assumed, in addition, the right to seize the inheritance until the debt should be duly discharged.³³ Yet there is the curious fact that those who wrote the Pipe Rolls were inclined, even after

³¹ See *e.g.*, footnote 10, *ante*. The names and fees of tenants holding of such an honour, in the King's hand, are sometimes to be found in other records, *e.g.*, *Red Book of the Exchequer* and the *Book of Fees*. So also, sometimes, are the sub-tenants of other baronies and bishoprics.

³² Glanv. vii, 8; 2 P. & M. 342.

³³ *Ibid.* 343. Thus, when Glanvill's brother Roger died (*c.* 1195), Roger's debt to the King fell upon his heir Agnes and her husband; and the King compelled them to pay by seizing the lands that she had inherited: 10 Cambridge L.J. 95, 97. See also 1 N.S. 93 and 5 N.S. 49, where William de Glanvill inherits the indebtedness of his brother Stephen ("whose land he has"), who had himself inherited it from his father Bartholomew, a defaulting sheriff: 29 P.R.S. 19. When Eustace de Burnes died, owing seven marks to Aaron of Lincoln and so to the King, Robert de Turneham who had his heir and land in custody was summoned to the exchequer to answer for it (21 N.S. 21) and discharged it at once (12 N.S. 210)—here Eustace had specifically pledged his lands to Aaron (see 2 N.S. 148, 313; 10 N.S. 62). The lord as guardian of an infant heir was liable also for his scutages it seems: see 8 N.S. 30, where Hubert Walter has a special writ from King Richard which excuses him the scutages of his wards (including Glanvill's grandson, Hugh de Aubervill).

the debtor was dead, to repeat year by year that *he* still "owes" the debt. Only some formal decision by the barons of the exchequer, perhaps, would justify a new entry asserting that the heir now owes it.³⁴ And if, indeed, the heir or some other person discharges some part of it, the Pipe Roll is likely to persist in its usual formula (e.g., "in the treasury one mark"), as though the deceased is still alive and has himself made the payment,³⁵ or to say "in the treasury one mark by the hand of X" as though X is some servant of the debtor and has come with the money on his behalf.³⁶ In theory, no doubt, the chattels of a deceased debtor were primarily responsible for his debts³⁷ and the exchequer should not order its sheriffs to seize his inheritance unless his chattels were insufficient; for the twelfth-century heir, though burdened with an unlimited responsibility for the debts of the deceased, was nevertheless entitled to pay them out of the deceased's chattels in so far as these sufficed.³⁸ But our Pipe Rolls tell us nothing of this: their prime purpose was to record how much money was still owed to the King at the year's end, not what was the law of the matter. True, the exchequer kept other rolls than these. In particular there were Memoranda Rolls which recorded the problems to be put to the barons of the exchequer and perhaps the orders which were sent to the appropriate sheriff after they had reached

³⁴ Perhaps the heir was not entered as debtor until the exchequer released the inheritance to him on his undertaking to pay.

³⁵ An example is Eustace de Burnes' debt, see note 33, *supra*. In fact the Pipe Roll of 1200 (12 N.S. 210) does not say who pays it: we are merely told that Eustace, whom we know to be dead, accounts for the debt and is quit. But the Memoranda Roll of the preceding year (21 N.S. 21) shows that Robert de Turnham, the guardian of Eustace's heir, was regarded as liable to pay and was summoned to the exchequer to show by what right he held the heir and that the lands meanwhile were seized into the king's hand. The clear implication is that Robert paid.

³⁶ See *post*, pp. 172-173, re the payment of Glanvill's debt and for the formulae which seemed (wrongly) to imply that he was still alive.

³⁷ 2 P. & M. 342-343. In those days a deceased freeholder's chattels devolved upon his heir, to be applied by him according to the deceased's will, if any: Assize of Northampton, 1176, c. 4; cf. footnote 19, *ante*. In Glanvill's Treatise an heir is bound both to observe the deceased's testament and to pay his debts (VII, 5) and this statement is not restricted (as it is in Bracton f. 60) to cases where the deceased's chattels do not suffice; but a later passage (VII, 8) implies that the testament operates only upon such chattels as remain after the debts have been paid out of them.

³⁸ 2 P. & M. 343. See W. A. Morris, *Medieval Sheriff*, 134-135, for the exchequer's rules as to distraint in the latter half of the 12th century and for the rule that the sheriff's power of collection extended both to the debtor's movables and to the issues of his land. The practice seems to have been, in the 13th century if not before, that the sheriff should at once seize the chattels of any deceased person who died indebted to the king, and should withhold them from the executors until the exchequer authorises him to release them: this the exchequer would not do until the debt was paid or the executors had found security for its payment: 11 N.S. (Memoranda Roll, 1230) pp. xxi-xxii, 39, 48. Meanwhile, moreover, the sheriff would be distraining the deceased's land and heirs for the debt: *ibid.* p. 52 (Glos.): cf. *Magna Carta*, 1215, c. 9.

a decision. From our period, however, few Memoranda Rolls survive.³⁹

As we shall shortly see, Glanvill himself died indebted to the King.⁴⁰ It was a debt of a very unusual kind; but before we examine it further there is something more that should be said about the exchequer and the financial machinery of his time—something which may help us to conclude that Glanvill's many public duties were not necessarily inconsistent with pre-eminent learning in the law.⁴¹ In his day, judicial and governmental business were tied together. The sheriff collects the King's revenues; but he also presides in the shire court.⁴² Itinerant justices are concerned with fiscal matters as well as with matters of pure law.⁴³ The deliberations of the *Curia Regis* cover, *inter alia*, both problems of finance and problems of justice: and, in either case, its members (whether called barons or justices) are likely to be identical, and the justiciar—second only to the King—is supreme.⁴⁴ Indeed, Mr. H. G. Richardson asserts that during this period Bench and Exchequer were one.⁴⁵ However that may be, there would seem to be no room to doubt that, though famous also as an administrator, the Glanvill who presided over those two powerful courts and had served long as an itinerant justice was a man exceptionally learned in the law.⁴⁶

§ 2. GLANVILL'S DEBT AND HIS CHILDREN

The debt which Glanvill owed the exchequer at his death derives

³⁹ The earliest surviving Memoranda Rolls are those from the year 1199, printed in 21 N.S. (*ibid.*, p. xvi). Those for the year 1230 are printed in 11 N.S. Footnotes 35 and 38, *supra*, illustrate the additional information that may be found in them.

⁴⁰ *Post*, pp. 172-173.

⁴¹ His steward, Reiner de Waxham, relieved him of most of his duties as sheriff of Yorks (and was even called "sheriff" there, though not, of course, at the exchequer): see E.Y.C., i. 479; ii. 313; iii. 120, 283, 374, 399, 448. Moreover, as Justiciar, he had his own mobile staff of clerks from the Chancery to issue his judicial and administrative writs, the exchequer issuing those relating to financial business: see H. G. Richardson, Introduction to 21 N.S. pp. lxxv-lxxxvi (*s.t.* "The Justiciar's Chancery").

⁴² 1 P. & M. 519.

⁴³ H. G. Richardson, Introduction to 21 N.S. xiii-xv.

⁴⁴ *Ibid.* xiii-xiv, xciii ("the whole atmosphere of the exchequer was that of a court of law whatever the nature of the business before the barons"). Some writers do not entirely accept Richardson's view that Bench and Exchequer were identical: see S. B. Chrimes' Introduction Essay to Vol. i of Holdsworth's *History of English Law* (7th ed.), p. 32*. It is reasserted in 70 L.Q.R. 568-570; 73 L.Q.R. 559.

⁴⁵ 21 N.S. lxxvii, lxxxix (citing Roger de Hoveden); see also the sub-title of Glanvill's treatise. Cf. Plucknett, *Concise History of the Common Law*, 5th ed., 235, where it is said that although Glanvill, Hubert Walter, and others—including presumably Geoffrey fitz Peter (the third possible author of the Glanvill Treatise, see *ante*, footnote 22)—considerably influenced legal development, yet in view of their diverse duties "we can hardly describe them as lawyers or judges"—meaning, presumably, that they were not lawyers or judges *simpliciter*.

⁴⁶ *Ibid.* 135.

from two series of curious entries, similar in character, to be found in the Pipe Rolls.

One of these concerns Nicholas fitz Comitis and begins in 1187. In that year, under the heading "Pleas of the Forest" in Hampshire, this Nicholas is recorded as owing twenty marks for a default.⁴⁷ In the following year this entry is repeated (for Nicholas has paid nothing), with the following qualification:—"but, of these, ten marks are to be sought from Rannulf de Glanvill who has acknowledged that he received them from the said Nicholas."⁴⁸ The entry persists in this expanded form until Michaelmas 1191, by which time Glanvill (as we know from other sources) was already dead. Now we find that the exchequer has formally split the debt between Nicholas and Glanvill: Nicholas, says the Hampshire Pipe Roll, owes £6 3s. (*i.e.*, ten marks less 10s. 4d. that he has paid in the preceding year)⁴⁹; and "Ranulf de Glanvill owes ten marks which he acknowledged that he received from the said Nicholas; but he [?] it] ought to be sought in Suffolk."⁵⁰ This means, no doubt, that the sheriff of Norfolk and Suffolk where Glanvill's land lay, is the appropriate official to collect Glanvill's share of the debt. And in the following year (1192) we find this to be so: whereas Nicholas and his debt of £6 3s. are still listed under Hampshire,⁵¹ it is now the roll for Norfolk and Suffolk which charges Glanvill with the "ten marks which he acknowledged he had received from Nicholas fitz Comitis."⁵² We need not trouble ourselves further with Nicholas,⁵³ for it is Glanvill's share of the debt that is our concern. By the year 1192, as we have seen, the exchequer had assigned to it the accounts of the sheriff of Norfolk and Suffolk. There it remained, repeated verbatim year by year without comment and with nothing of it paid, until the year 1198.⁵⁴

Meanwhile, the clerks of the exchequer have been entering against Glanvill's name another debt. It first appears in the Pipe Rolls for Northamptonshire, in the year 1191, and the entry is as follows:—"Rannulf de Glanvill owes fifty marks, which he has

⁴⁷ 37 P.R.S. 197. This and other entries show that it was a plea of the forest "*per* Geoffrey fitz Peter"—who was destined to succeed Hubert Walter as justiciar.

⁴⁸ 38 P.R.S. 174.

⁴⁹ 1 N.S. 134.

⁵⁰ 2 N.S. 87. The entry erroneously states of Nicholas' debt (though now reduced by the ten marks) that Glanvill is responsible for ten marks of it: the clerk has copied blindly from last year's roll.

⁵¹ 2 N.S. 296 (again with the error mentioned in preceding note).

⁵² 2 N.S. 194. There is a blank space where the words "owes" (or "renders account") should stand. This is not unusual and seems to occur fairly frequently when a debtor is dead. Probably the rolls were drafted in outline before the clerk knew whether any part of the debt would be paid.

⁵³ The entries about his side of the debt continue to 9 N.S. 20 (1198).

⁵⁴ The last of these repetitions is in 8 N.S. 230.

confessed that he received from Samuel, Jew of Northampton, who owed them for a concord (*pro concordia*) between Margery of London and her sons and daughter. But he [? it] ought to be sought in Norfolk."⁵⁵ This entry is repeated almost word for word (save that *requiri* becomes for a while *summoneri*), until the year 1194, when it moves from among the entries for Northamptonshire to those for Norfolk and Suffolk.⁵⁶ There it continues unchanged (save that its last sentence is omitted and "daughter" has become "daughters"), without any comment or note that any payment has been made, for three more years.⁵⁷

Then, in the year 1198, the ten marks which Glanvill has received from Nicholas and the fifty marks he had received from the Jew are combined, as a single entry, in the Norfolk and Suffolk roll. And this time he is said to "render account" of both debts, for at long last there is a payment:—"in the treasury twenty marks by the hand of Thomas de Arden."⁵⁸ The following year there is another payment:—"in the treasury eleven marks by the hand of Maud de Albervill; and he (still) owes twenty nine marks of which nine marks are upon the said Maud and twenty marks are upon Rannulf fitz Ribald."⁵⁹ For yet one more year, wherein nothing is paid, it is still Glanvill who "owes" the debt and the nine and twenty marks outstanding are still "upon" Maud and Rannulf fitz Ribald.⁶⁰ Thereafter the rolls state unequivocally that Maud *owes* nine marks and that Ranulf (or Rannulf) fitz Ribald *owes* twenty marks; but nothing more is paid by either of them.⁶¹ Finally, in the year 1203, King John sends his writ to Geoffrey fitz Peter (now justiciar) ordering that "Maud de Aubervill and the heirs of Rannulf de Glanvill" be quit of the remaining twenty-nine marks.⁶² His stated reason for thus acquitting them is a certain gift or loan which Glanvill made him in King Henry's time. One would like to think, however, that it was prompted also by some appreciation of the years of training and experience that John had gained when, in his youth, he was in Glanvill's care.⁶²

⁵⁵ 2 N.S. 154.

⁵⁶ 5 N.S. 63. In 1191 and 1192 its final sentence had changed to "But he ought to be summoned in Norfolk"—2 N.S. 259; 3 N.S. 94.

⁵⁷ The last of these repetitions is in 8 N.S. 231.

⁵⁸ 9 N.S. 82.

⁵⁹ 10 N.S. 266.

⁶⁰ 12 N.S. 133.

⁶¹ 14 N.S. (1201) 131; 15 N.S. (1202) 107.

⁶² 16 N.S. 238. King John forgives the debt, says the writ, because Glanvill provided him with plate (*pro vesselemento quod . . . nobis commodavit*) before he was count of Mortain: *Liberate Rolls* (1202) 26. Glanville had been John's tutor (see Poole, *Domesday Book to Magna Carta*, 243, 429); took him at the King's command to Normandy in 1183; and went with him to Ireland in 1185 (see D.N.B., *s.t.* John): it was in those times, presumably, that John witnessed several of Glanvill's charters; *e.g.*, 6 *Monasticon* 881 (c. 1182?); 1 E.Y.C. 255 (c. 1179-85).

Here, then, we have evidence that Glanvill, on his own admission, had received during his lifetime—and presumably whilst he stood in the king's place as justiciar—a total sum of sixty marks (£40) which he ought to have paid into the treasury; that he never accounted for any part of it during his lifetime; and that, some eight or ten years after he was dead, the exchequer rolls formally divided the liability among three named persons in equal shares. These three persons, moreover, are or are descended from his three daughters, Maud, Mabel and Helewis: our Maud de Albervill or Aubervill is his last surviving daughter Maud, under her married name; Thomas de Arden is descended from Mabel; Ranulf fitz Ribald is the son of Helewis.⁶³

Accordingly, we may assume that the barons of the exchequer, in or about the year 1199, regarded these three daughters (those now dead being represented by their respective heirs) as co-heiresses of their dead father's lands. It so happens that, for this same year, we have the earliest surviving Memoranda Rolls—rolls which tend to be more informative than the terse roll of the Pipe to which they were the prelude.⁶⁴ And in these Memoranda Rolls there is a hint in the direction we have supposed. Where they speak of the nine marks still due from Maud de Aubervill, in respect of her share of Ranulf Glanvill's debt, they add (what is not in the Pipe Rolls) "Whose heir she is, concerning part of her [?] his] inheritance."⁶⁵ True, when they proceed to Ranulf Ribald's share of the debt, they do not say that he too is Glanvill's heir. It may well be that this is what they intended to imply; but, as we shall now see, the fact that only Maud was specifically described in our roll as Glanvill's heir may be significant of her superior position as the firstborn of his daughters.⁶⁶

The special status of the firstborn among daughters is mentioned in the Glanvill treatise *De Legibus Angliae*:⁶⁷ a treatise which, if its author wrote the *incipit* of it, confines itself avowedly to those laws and customs of the realm which one can plead "in the king's court at the exchequer" and before his justices elsewhere.⁶⁸ If a man dies leaving only daughters, whether he was a knight or no, the inheritance shall be divided between them—

⁶³ 6 *Monasticon* 381 (Maud, Thomas); *ibid.*, 921 (Ranulf).

⁶⁴ *Ante*, p. 171, footnote 39.

⁶⁵ 21 N.S. 77 (*s.t.* Norfolk and Suffolk). The entry continues as follows: "and Ranulf Ribald [owes] twenty marks of the debt of the said Ranulf [de Glanvill]."

⁶⁶ See the following paragraphs; also the words quoted *ante*, p. 173, from King John's writ.

⁶⁷ VII. 3.

⁶⁸ See Richardson, 21 N.S. p. xiv, n. 5, as to the misleading commas customarily inserted in this the sub-title (or *incipit*) of the Treatise. The validity of the *incipit* has been challenged, but Professor Woodbine (see his edition of *Glanvill*, p. 183) thought it might well have been part of the original work.

seemingly in equal shares. But the eldest of them (like the eldest among sons when land is anciently partible) is to have the chief messuage, and although the other daughters are responsible for the services due from their shares of the inheritance they render these services to the lord through her. In short she (or her husband standing in her place) holds the whole inheritance as tenant of the lord, whilst her younger sisters are mere sub-tenants holding their lands under her; and this arrangement, it seems, will persist for three generations.⁶⁹ For the sake of convenience we may term these privileges of the firstborn her *aesnescia*, though the treatise employs it only when dealing with the right to occupy the chief messuage.⁷⁰

If, therefore, Maud was indeed the firstborn of Glanvill's daughters, she was his heir in a somewhat special sense, and we may expect to see evidence of this, and of a like pre-eminence in her own heir after she is dead, when we attempt to trace the devolution of Glanvill's lands.

That she was the firstborn is implied, I think, by the document in which Butley Priory, which Glanvill had founded in Suffolk, records the *progenies* of its founder: it speaks of her as the "first" of the three sisters; of her marriage to a certain knight named William de Aubervill; and of Hugh their son, and so on.⁷¹ Such records kept by religious houses were to them of great importance. At any time they might lose their lands, in litigation, if unable accurately to trace and vouch the heirs of their benefactors or if, when sued by someone who claimed to be heir, they could not counter readily his version of the descent.⁷² But when the Butley record comes to Helewis, the "third" daughter, we find surprising errors: the very name of her husband—he was Robert fitz Ralph fitz Ribald—is stated incorrectly (as "Robert fitz Robert") and the list of their descendants is hopelessly inaccurate.⁷³ Perhaps one ought not to expect from the monks of Butley Priory, in the county of Suffolk, an accurate knowledge of the great Yorkshire

⁶⁹ The Treatise is also much concerned with questions of homage in such a case: her husband (if any) does homage for the whole fee; but the younger daughters and their husbands and heirs, to the third generation, do neither homage nor fealty to her. See further 2 P. & M. 274.

⁷⁰ VII. 3. It uses the word only when expounding that right for the eldest male in partible lands: *salvo tamen capitali mesuagio primogenito filio pro dignitate aesnesciae suae*. But when speaking of a firstborn daughter (*ibid.*) it refers back to this rule.

⁷¹ 6 *Monasticon* 381.

⁷² Some of the most informing sources of pedigree are actions against religious houses wherein a donor's heir claims lands or advowsons from them. A striking instance, one of many, is seen in 2 E.Y.C. pp. 352-354, where (at p. 354) the nuns of St. Clement's, York, vouched in the year 1245 the supposed heir of a benefactor (Agnes Fossard) to defend their title to land given them a hundred years before.

⁷³ 6 *Monasticon* 381.

baron whom Helewis married or of his family⁷⁴—her own foundation (Coverham Abbey) in Yorkshire is naturally more reliable in these matters.⁷⁵ Nevertheless, these errors in the Butley record warn one to treat it cautiously, the more so since some parts of it could not have been written earlier than the fourteenth century.

This Butley record, after stating that Glanvill procreated of Berta, his wife, these three daughters (it says nothing of any sons), proceeds "*quibus dedit terram suam ante progressum suum versus terram sanctam*"; and it then records what lands each daughter had "of her father's gift."⁷⁶ If this statement is correct, it seems to show that Glanvill distributed his lands before he died, and so did not permit the rules of inheritance to operate upon them. We have other records of men who gave their children seisin of their lands before setting forth on a crusade. Glanvill's brother Roger, who went to the crusades with him, is one of them; and there is some reason to believe that the son, to whom Roger Glanvill so gave his land before departing on that journey, was a bastard.⁷⁷ If, therefore, the Butley record is correct, there is room for some faint suspicion that Glanvill, too, distributed his lands in order to oust the strict rules of inheritance. But such a supposition cannot be supported unless one can show that Glanvill left a son and that, in spite of such a son, the barons of the exchequer would still have said, as they seem to have said in the year 1199,⁷⁸ that his daughter Maud was his heir.

There is a possible son for Glanvill, in our legal records, in the shape of Osbert de Glanvill, who held office as one of the king's justices. He is seldom even mentioned in our records and his precise relationship to our Glanvill is difficult to ascertain.⁷⁹ There is no hint anywhere that he made any attempt to oust Maud and her sisters from their enjoyment of Glanvill's inheritance. But if we suppose that Glanvill found some lawful means of disinheritance such a son (a son whom we suppose to have been born in wedlock), both Osbert's reticence and the exchequer's decision that Maud is heir would be explained.

The treatise which bears Glanvill's name does not answer very clearly the questions we would put to it. It was written probably shortly before Glanvill died, at a time when the law was still adhering

⁷⁴ But the excuse is the weaker in that the family held also several fees in East Anglia.

⁷⁵ 6 *Monasticon* 920-921: even this record omits one of her sons.

⁷⁶ 6 *Monasticon* 381. This story is repeated by some later writers, e.g., Campbell, *Lives of the Chief Justices*, i. 35, though not by Maitland (D.N.B.).

⁷⁷ See 10 *Cambridge Law Journal*, 101-103.

⁷⁸ *Ante*, p. 174.

⁷⁹ See *post*, pp. 178 *et seq.*

to old doctrines which were soon to be swept away.⁸⁰ We may confine ourselves to the case of lands acquired, since there appears to be no definite evidence that Glanvill gained any of his lands by inheritance. Can a man give away these "acquisitions" in his lifetime? The treatise answers (thinking particularly of those who desire to prefer their bastards) that one who has only acquisitions can give them away in his lifetime provided that he does not give all, "since one cannot disinherit entirely (*exheredare*) one's son and heir."⁸¹ Moreover, one may make a marriage gift (*maritagium*) with one's daughter, or with any other woman, to the extent of a reasonable part of one's lands, and one's heir can do nothing against it so long as the gift is completed before one dies.⁸² But no man can give lands effectively by his last will, unless his heir consents and subsequently confirms the gift.⁸³

These rules show clearly enough that anyone wishing his daughters to have the greater part of his lands, to the exclusion of his son, would take care to distribute the lands among them before he died; and this is what Glanvill did, according to the Butley record. But so far we have found no indication in our rules that, when a father has taken such precautions and is dead, the courts of law will regard his daughters (as the exchequer evidently regarded Maud) as his next heirs. Indeed, there are passages in the Glanvill treatise which suggest the contrary. We are told that God alone, not man, can make an heir⁸⁴; that an only son inherits all⁸⁵; and that he so inherits even if there be daughters.⁸⁶ But each of these three dicta occurs in some context which either begs our question or is directed at a slightly different one.⁸⁷ We cannot doubt that this somewhat evasive atmosphere was intended, for this

⁸⁰ See 2 P. & M. 306-311 for the disappearance, *circa* 1200, of Glanvill's rules against alienating one's lands away from one's heirs.

⁸¹ VII. 1. One who has no lawful issue can give away the whole and so disinherit entirely his heirs collateral; but this can only be done by gifts *inter vivos* with livery of seisin, "because God alone can make an heir, not man": *ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ VII. 1, and see footnote 81, *supra*. This is not necessarily a strong objection: the author of the Treatise was probably still thinking of bastards, who never can be heirs. He would have said, I think, that when one leaves legitimate sons and daughters all (without any help from man) are equally one's "heirs"—he uses the word in the sense of *potential* heirs; but that some heirs (here the eldest son) are *nearer* than the others and so inherit: see VII. 3.

⁸⁵ VII. 3 (near the beginning of that chapter). But this again is not conclusive for us, since the passage is dealing with a man who dies "*hereditatem habens*" and so may not apply to Glanvill's acquired lands. Moreover, it begs our question by supposing an only "son-heir" ("*si unicum filium habuerit heredem*," etc.).

⁸⁶ VII. 3 (in mid-chapter). But again the objections of the previous footnote apply—e.g., the passage begins "*si vero filium habuerit quis heredem*."

⁸⁷ See the three preceding footnotes.

part of the treatise is much concerned with two cases in which some ancient rule, half-forgotten, may operate to displace the normal heir: a son may be as it were pensioned out of the family (*forisfamiliatus*) if his father gives him lands and he consents freely⁸⁸; no man may be at once heir and lord.⁸⁹ As to the first of these, the son who goes out of the family, the treatise is very restrained. He is mentioned once only, and only with relation to the contentious problem whether, if an eldest son dies in his father's lifetime leaving issue, the second son becomes that father's heir.⁹⁰ Much more is said of the mystery "heir and lord," whereby one who or whose father has received my homage is precluded from asserting that he is my heir; but this is law which does not affect our problem.

We are thus driven to the conclusion that when, in the year 1199, the exchequer decided that Maud, or Maud and her sisters (or their issue), were Glanvill's heirs, this decision implied one of two things: either (i) Glanvill left no son who, or whose issue, was then living; or (ii) any such son was then already dead, whilst his issue (if any) were debarred from inheriting on the ground that Glanvill, with that son's consent, had put him out of the inheritance by giving him adequate lands.⁹¹ It does not seem likely that Glanvill would have relied upon this last expedient, unless there was no other way, for one suspects that forisfamiliation in his day was already becoming a rare and dubious thing. Nevertheless, if Osbert was indeed his lawful son, this is the alternative that best fits the facts. Let us examine them.

Osbert seems to die in the year 1195 (five years after his supposed father). The rolls of the King's Court at the close of the preceding year show him as defendant in an action brought by a widow claiming her dower. She is suing him for dower in the county of Northampton and he twice essoins himself, first *de malo veniendi* and then *de malo lecti* at "Tateston" (with Suffolk as its marginal venue).⁹² Evidently he died of this illness, leaving as his heir a son named Ranulf; for when this action reappears, early in the year 1196, there is a compromise between the widow's

⁸⁸ VII. 3; 2 P. & M. 282, 436n; Woodbine's notes to *Glanvill*, p. 228. Compare *Leges Henrici Primi*, c. 87, § 13, that a prospective heir who voluntarily abjures his parents cannot inherit from them; also *ibid.*, § 15, as to one who deserts them in their necessity.

⁸⁹ VII. 1; 2 P. & M. 287 *et seq.*; Woodbine's notes to *Glanvill*, pp. 224-225; 9 *Cambridge Law Journal*, 88 *et seq.*

⁹⁰ The author of the Treatise contends that the second son is heir (to the exclusion of the first son's issue) only where the first son was forisfamiliated; but his words seem to say that, though forisfamiliated, the first son does inherit if he outlives his father: VII. 3.

⁹¹ See previous footnote that such issue would not thereby be barred from the inheritance, perhaps, if Glanvill's son had outlived him.

⁹² 1 R.C.R. (November 1194) 81, 106, 128. For "Tateston" see *post*, pp. 181-182 and footnote 18.

warrantor and "Ranulf fitz Osbert de Glanvill."⁹³ In the year 1199, this Ranulf is again concerned in litigation. This time he is vouched to warranty by one Hervey de Gedding, his late father's tenant in Hartest (Suffolk), and comes readily into court and warrants him; but this impulsive warranty is nullified at once, by special writ of the king *de ultra mare*, on the ground that Ranulf is under age and so, by the custom of England, cannot be impleaded of any free tenement of his.⁹⁴ It is clear therefore that in July, 1199, Osbert, though dead, is represented by a living infant heir; and this heir, be it noted, tends to be recorded at this time simply as Ranulf de Glanvill.⁹⁵ Moreover, the king's writ *de ultra mare*, which we have noticed above, states that the infant Ranulf is in the custody of Hubert Walter, archbishop of Canterbury; and it was Hubert Walter who likewise held in custody at this time the infant heirs of Glanvill's daughters.⁹⁶ It seems probable, therefore, that Osbert and Glanvill's daughters were of the same generation. If he was Glanvill's son, why did not the exchequer decide, in 1199, that his own son Ranulf was Glanvill's heir? Our answer must be either that Osbert was born out of wedlock, or that Glanvill had forisfamiated him, or possibly that the analogy of King John's accession to the crown of England in that very year was too close to allow of a decision in Ranulf's favour.⁹⁷ Of these alternative answers the first seems the most likely to be correct.⁹⁸

As yet I have failed to find for Osbert de Glanvill and Ranulf, his son, any decisive evidence of a relationship with Glanvill, or indeed with any of the collateral Glanvill families. It is convenient, however, to say now what remains to be said of them.

Osbert is listed among the justices before whom two fines were

⁹³ 24 P.R.S. 234 (Hil. 1196); see further footnote 9, *post*. This entry states that Osbert had bought some 2½ bovates of land in "Dracloue" (Northants) from the widow's late husband. Her warrantor (William de Dracloue, her late husband's brother) acknowledges Ranulf's right to hold of him. There are errors and deficiencies in the roll. That same term Ranulf is suing (as "Ranulf de Glanvill") in Northants a plea *cuiusdam nativi*: 24 P.R.S. 237.

⁹⁴ 1 C.R.R. 96; 1 R.C.R. 241, 434. So the action continued between the original parties; and Ranulf's tenant, who had vouched him, won without his assistance: 1 R.C.R. 429; 1 C.R.R. 135.

⁹⁵ See the references in the preceding footnote; also 1 R.C.R. 433 (July 1199) where he is sued for a novel disseisin committed at Brockley (Suffolk) and must pay damages and amercement.

⁹⁶ See *e.g.*, 5 E.Y.C. 303 (the son of Helewis); also *ante*, p. 169, footnote 33 (the son of Maud).

⁹⁷ See 2 P. & M. 281 *et seq.* The analogy was even closer in the case of Glanvill's brother Roger: see 10 *Cambridge Law Journal*, 99 *et seq.*

⁹⁸ The fact that Osbert outlived Glanvill both reduces the force of the analogy suggested and excludes the principle of forisfiliation in the limited scope which the treatise seems to give it (see footnote 90, *supra*). Moreover the actual problem raised, both by the *casus regis* and by the treatise, was whether a younger son (not daughters) should inherit instead of the deceased son's issue.

levied in the years 1182 and 1189 respectively,⁹⁹ but (like Glanvill), he does not appear in any fines of later date. He is often a prominent witness to charters in which Glanvill is concerned.¹ In the year 1184, King Henry gave him the custody of an infant heir.² He had been associated in some way, two years previously, with the king's custodians of the vacant abbey of St. Edmund's, and himself held some land as its tenant.³ It seems that he married the widow of one William de Criquetot.⁴ Besides his son Ranulf, he had at least one daughter and perhaps a second son, Thomas.⁵

Osbert's daughter (we are not told her name) is mentioned in a curious action in which, in the year 1227 after she is dead, a plaintiff claims certain lands which Osbert had bought and had given her as her marriage-portion. Her married daughter, Maud, who now holds those lands as her own marriage-portion, is defendant, and Maud's husband, of course, is defendant with her. Ultimately the Grand Assize comes with its verdict of the facts and finds in their favour. Meanwhile, however, Maud and her husband, fearing an adverse verdict, had taken unusual precautions against her brother Giles who, as her parents' heir, was warrantor of her title. Besides vouching him to warranty in the action, they had obtained from the king at Westminster a special writ of prohibition to prevent him from disposing of his own lands—for those who lose their land in an action are entitled to be compensated from the lands (if any)

⁹⁹ 17 P.R.S. Nos. 2, 4.

¹ e.g., Glanvill's foundation charters to Butley Priory (6 *Monasticon* 380) and Leyston Abbey (*ibid.*, 880-881). See also 2 E.Y.C. 397 (No. 1096) where the first three of seven witnesses to a charter, c. 1180-1186, whereby William Fossard gave land in York to a monastery, are "Ranulf de Glanvill, Osbert de Glanvill, Hubert Walter." Also 1 E.Y.C. 256 (No. 336) where, in a charter made by Glanvill himself, c. 1179-1185, concerning land in York, Osbert de Glanvill heads a list of seventeen witnesses who included William de Aubervill, four Glanvills, Hubert Walter, and a Theobald de Valeines (or Valoines).

² 35 P.R.S. (*Rotuli de Dominabus*) xxii, 59, 61, 68, 79—the infant son of Stephan de Bello Campo.

³ In 31 P.R.S. 74, the custodians of the vacant abbey say that their debit balance is *super* Osbert de Glanvill; see also 2 R.C.R. 10-11. Subsequently, Osbert witnessed a charter made (c. 1182-1190) by Samson, the new abbot: *Kalendar of Abbot Samson*, 84 Camden Third Series, 107. The land that he held of the abbey lay in Babergh Hundred, Suffolk, paying sheriff's aid at 18d. (*ibid.*, 65): it was in "Cranemere" and owed suit to the hundred court (*ibid.*, 69).

⁴ In 1199 that William's heir, Heinfrid, says that whilst he was an infant his step-father, Osbert de Glanvill, had his lands in custody: they are in Suffolk, of the Honour of Bolonia, and adjoin the liberty of St. Edmund's Abbey: it is a question about the right to hang felons: 2 R.C.R. 10-11. These lands are evidently the knight's fee in Ousden (Suffolk) which Heinfrid holds of the honour in *Red Book*, 141, 479, 579; *Fees*, 237, 241, etc.

⁵ This Thomas de Glanvill had a message in Ousden (*cf.* footnote 6, *infra*). Perhaps he was in orders or a bastard, for it was quit-claimed to him and *his assigns* (with no mention of heirs): 24 P.R.S. No. 35 (October 1198). There had been perhaps another son, William: see 24 P.R.S. 234-235.

of their warrantor. Before the action ended, however, Giles betook himself to religion and so became civilly dead.⁶

Ranulf (fitz Osbert) de Glanvill sued, in the years 1201–1202, to recover his mother's *maritagium* in Suffolk.⁷ But in 1205 he seems to be dead, for in that year his daughter Christiana is delivered into the custody of the Earl of Oxford, in the presence and with the licence of the king's justices.⁸ The record of this event bears the marginal venue Northants, where Osbert (as we have seen) had purchased land.⁹ And the fact that it was Ranulf fitz Robert (son and heir of Helewis de Glanvill) who so delivered Christiana to the earl suggests a close relationship with the Glanvill family. Moreover, it is not unlikely that the *Ralph* de Glanvill, who is recorded among the benefactors of Butley Priory as "grandson of the founder," is in fact our Ranulf.¹⁰

A Petronilla de Glanvill, or Lady Petronilla, is to be found in the records of the Bishopric of Ely in the year 1212 and again in 1251. She holds half a knight's fee in Suffolk at a place, described differently in different records, which seems to be the "Tateston" where Osbert de Glanvill lay in his last sickness.¹¹ There are three records, two of them unpublished,¹² of her tenancy in the year

⁶ B.N.B. No. 1920 (Suffolk Eyre 1227). Osbert's daughter had married William de Merc. Her *maritagium* was 100 acres at Ousden (Suffolk), and this they gave to their daughter Maud on her marriage to Peter de Thelnetham. William's son Giles was accordingly bound in law as his father's heir to warrant the gift (see *Cambridge Law Journal*, viii, 281 *et seq.*, ix, 195, 201 *et seq.*) He duly warranted and put himself on the Grand Assize before becoming a monk. His civil death (see 1 P. & M. 416 *et seq.*) meant, presumably, that Maud inherited his lands. It would also have put an end to the action, had not the parties agreed otherwise. The plaintiff was a William de Criketot—a descendant of the William de Criketot whose widow had married Osbert de Glanvill. For this and their connection with Ousden see the two preceding footnotes.

⁷ 2 C.R.R. 78–79. Rye, *Calendar of Suffolk Fines*, p. 8. The land is one carucate in Barningham and Thelnetham; defendant is Bartholomew de Culverdeston ("parson of Langeford").

⁸ 4 C.R.R. 57.

See footnote 93, *ante*. The *Book of Fees* (pp. 498, 932, etc.) for the period 1235–1243, seems to show that the earls of Oxford held only two knights' fees in Northants—at Wold (or "Wald"). At that time there are four tenants thereof each holding one half fee of the earl. The Pipe Rolls of the years 1190–1192 show (*s.t.* Northants) that Osbert de Glanvill had pledged his land of "Wald" to Aaron of Lincoln for over £40, but was pardoned the debt by King Henry II: 2 N.S. 159, 263. It seems likely, therefore, that this land was held of the earls first by Osbert and then by his heir Ranulf and that, at Ranulf's death, his heiress Christiana fell accordingly into the earl's custody. The fact that there are four tenants in 1235 might suggest that she is now dead, leaving four daughters whose husbands they are. But it seems more likely that the Glanvill holding comprised only one of these half fees; for in 1243 (*Fees*, p. 932) one of these four tenants, William Toussaints, has been replaced by Robert Rote "with Christiana his wife"—so perhaps this is our Christiana carrying her half fee to two successive husbands.

¹⁰ 6 *Monasticon* 379. Ralph and Ranulf are names which the copyists often confused.

¹¹ See *ante*, p. 178; also *post*, footnote 18.

¹² For the substance of these two entries and for that cited in footnote 15, *infra*, I am indebted to Mr. Edward Miller, of St. John's College, who has made an extensive study of the Ely records.

1212; and in one of these Petronilla is said to hold her half fee in Tateston (or Chateston) of Ranulf Glanvill.¹³ The other two records of that year say merely that she has a half fee in Barking.¹⁴ But when we come to the year 1251 this discrepancy is explained; for now her half fee (now held of Henry de Sandwich) is said to be in "Caston [*sic*] which pertains to Barking."¹⁵ How she came to hold it of Ranulf—presumably meaning Osbert's son, for in 1212 our other Ranulf had long been dead—is not explained. Perhaps she was Ranulf's widow, holding it in dower of his gift.¹⁶ She could hardly be his mother (Osbert's widow), for in the year 1251 Osbert had been dead fifty-six years.¹⁷ Even "Tateston" itself, which, with its variants, seems to link her name with Osbert's, is difficult to identify today.¹⁸

¹³ *Cott. Claudius* C xi f. 19 d. See also footnote 16, *infra*. Cf. 28 N.S. (1211) 4, *bis*; where a William Oliver holds a half fee in "Tatingeston," Suffolk.

¹⁴ *Red Book* 526; *Cott. Tiberius* B ii f. 247 d. Barking was in Bosmere Hundred (*Book of Fees*, 330; *Inquisitio Eliensis*, f. 20, cf. 25 b; *Domesday*, ii, 383 a). Some of the Ely holding there seems to be associated in *Domesday* (ii 382 b) with the vill of Finborough, where Glanvill subsequently held two knights' fees of the Bishop—Miller, *Abbey and Bishopric of Ely*, 173. In the *Red Book*, 526, Petronilla seems to hold under Hugh de Aubervill.

¹⁵ *Caius* 485/489, f. 322 d. This Henry de Sandwich now held the Aubervill lands, having married Joan the daughter and heiress of William de Aubervill: Farrer, *Honors and Knight's Fees*, iii 246; *Excerpt. Fin.* ii. 227.

¹⁶ If the clerk who wrote this record (see footnote 13, *supra*)—the only one of the three versions of the 1212 return to state that Petronilla holds of Ranulf—was experienced in legal matters we should not expect him to write that a widow holds her dower "of" her late husband. He would write that she holds it "of his gift" or "of" his heir (whose tenant she would strictly be). So Petronilla may be some Glanvill whom Osbert or Ranulf enfeoffed.

¹⁷ Moreover (see footnote 7, *ante*, p. 181) the fact that Ranulf sued for his mother's *maritagium*, in 1201, suggests that she was then already dead.

¹⁸ One mile S.S.E. of Barking, in Suffolk, there is a moated "Tarston Hall." Ten miles S.E. of Barking there is a Tattingstone. Chattisham, which lies six miles south of Barking, seems less likely.

THE HOMICIDE ACT 1957

A. L. ARMITAGE

So far as the law of England and Wales is concerned the Homicide Act, 1957, can be divided into two distinct parts. Part I of the Act makes certain reforms in the law of murder whether or not the murder be capital or non-capital. These reforms are important in themselves quite apart from the controversy in relation to the death penalty. Part II of the Act restricts the death penalty as the punishment to be imposed by the courts for the crime of murder to (a) certain kinds of murder defined in section 5 and called capital murder and (b) to murders by a person who has previously been convicted of murder as defined in section 6. For murders not falling within sections 5 and 6 of the Act the sentence "shall be imprisonment for life."¹

PART I. AMENDMENTS TO THE LAW OF MURDER

Part I may be summarised as covering:

- (a) The abolition of constructive malice in so far as this phrase is used to cover special rules making it murder where death is caused in the course or furtherance of a felony involving violence, or by violence in resisting arrest.
- (b) The introduction of a new defence of Diminished Responsibility applicable only to homicide, and capable of reducing murder to manslaughter.
- (c) The amendment of the law relating to provocation to allow provocation by words as well as by acts to be considered by the jury.
- (d) The reduction of the liability of the survivor of a genuine suicide pact from liability for murder to liability for manslaughter.

By the above amendments the crime of murder has been narrowed, and the crime of manslaughter correspondingly enlarged.

(a) *Abolition of constructive malice*

Here we are involved in the confusing terminology relating to "constructive" and "implied" malice and the terms are not

¹ Even in non-capital murders therefore murder retains its characteristic of an obligatory punishment and not one in the discretion of the court.

defined by the Homicide Act. The Homicide Act, s. 1, in fact abolishes the felony-murder rule and the similar rule governing death caused in resistance to arrest. In felony-murder an intention to do an act of violence in the course of a felony involving violence would suffice for malice aforethought, and where death had been caused in resisting arrest an intention to use violence in resistance to arrest would suffice for malice aforethought. In these cases "a much less degree of violence"² could suffice than would otherwise be required for murder. The abolition of these special rules is effected by section 1 of the Homicide Act, which provides:

"(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

By section 1 (2) a killing in resistance to an arrest is to be treated as a killing "in the course or furtherance of an offence" so as to be caught within the abolition in subsection (1).³ Section 1 has already been interpreted by a full Court of Criminal Appeal in *R. v. Vickers*⁴ in a reserved judgment "which will be guidance to the courts in the future" (Lord Goddard C.J., *ibid.*). In this case the court held that section 1 allows as sufficient malice aforethought for murder not only intent to kill but also intent to cause grievous bodily harm. The latter is implied malice within the section, "the necessary malice aforethought being implied from the fact that he intended to do grievous bodily harm" (*per curiam*). *R. v. Vickers* was a case of capital murder as the killing had occurred in furtherance of theft but the appeal turned entirely on the question of the interpretation of section 1. The accused was discovered in her house by the householder, an old lady, in the night whilst committing a theft. To avoid recognition and after an attempt to hide he struck the old lady many blows, and may have kicked her face. She died as a result of the injuries. The medical evidence was that the injuries could have been inflicted

² See *R. v. Appleby* (1940) 28 Cr.App.R. 1, and *cf.* Lord Goddard C.J. in *R. v. Vickers* [1957] 3 W.L.R. 326, 328 where he uses the phrases "moderate or even small degree of violence," "a little violence."

³ The marginal note to section 1 states "abolition of constructive malice." Prior to the Act the words "constructive" or "implied" were often used to cover these forms of malice aforethought, *cf.* Kenny, p. 122. After the Act it is likely that constructive will be used to describe these forms and implied will be reserved for intent to cause grievous bodily harm, *cf.* *R. v. Vickers* (and, in so far as it is a possible form of malice aforethought, knowledge that death will probably result from one's conduct *vide infra*).

⁴ [1957] 3 W.L.R. 326.

with a moderate degree of violence. He appealed on the ground that the jury had been misdirected in that they had been directed that if they were satisfied that he intended to kill or intended to cause grievous bodily harm they should find him guilty of murder. It was argued that although this would have been a proper direction before the Homicide Act, it was no longer such as a result of the enactment of section 1 of that Act and that the only satisfactory way of putting it under the new law would be that the accused used violence of such a character as would be likely to cause death. The Court of Criminal Appeal approved as impeccable the trial judge's direction to the jury which included the statement that if they were satisfied that the accused had the intention to cause grievous bodily harm he was guilty of murder and which concluded "If capital murder is not so proved and you come to the conclusion that the accused killed Mrs. Duckett without any malice, that is, without intending her any harm, or only trifling harm, then your verdict will be guilty of manslaughter . . ." and finally "Malice will be implied, if the victim was killed by the voluntary act of the accused done with the intention to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent but it must be serious, and it is serious or grievous if it is such as to seriously and grievously interfere with the health or comfort of the victim," and "Ask yourselves: Is it proved that the accused man killed Mrs. Duckett with malice, that is, when he struck the blows he intended to do her serious bodily harm?" One may criticise this phraseology as seeming to equate the intent to cause grievous bodily harm sufficient for the malice aforethought for murder with the grievous bodily harm sufficient under section 18, Offences against the Person Act, 1861, where the harm need only be such as to "interfere seriously with health or even with comfort," but it is to be remembered that the directions given to the jury are directions given in the light of the medical evidence heard in the particular case, and that even in this direction the final emphasis was on intention to do *serious* bodily harm.⁵ Where the facts require it greater emphasis is given, *e.g.*, "such drunkenness as prevents the accused knowing

⁵ Cf. Report of the Royal Commission on Capital Punishment, Cmd. 8932 hereafter referred to as R.C.C.P., § 472, where the Royal Commission stated: "We believe that few people would dispute the propriety of making the definition of murder wide enough to include cases where death is caused by an act intended to cause serious bodily injury. . . . We should . . . prefer to limit murder to cases whereby the act by which death is caused is intended to kill or to 'endanger life' or is known to be likely to kill or endanger life. But we do not believe that if this change were made, it would lead to any great difference in the day-to-day administration of the law. Our impression is that in practice the courts have been moving in this direction and that today, except in certain cases of killing whilst committing a felony or resisting arrest, a person

that what he is doing is *dangerous, i.e., likely to inflict serious injury*” in *R. v. Meade*⁶ or “*terrible injury*” in *R. v. Thomas*.⁷

The following further remarks may be made on the effects of section 1 of the Homicide Act:

- (1) An act causing death done with knowledge that death will probably result (*cf.* Stephen J. in *R. v. Serné*⁸) remains a possible form of malice aforethought sufficient for murder though in practice murder is hardly likely to be charged unless the contention is that life has been wilfully put in jeopardy.
- (2) The law relating to drunkenness sufficient to reduce murder to manslaughter will now be as stated in *R. v. Meade*,⁹ *i.e.,* such drunkenness as prevents the accused knowing that what he is doing is dangerous, *i.e., likely to inflict serious injury*. The limitations on it imposed in *D.P.P. v. Beard*¹⁰ arising from the felony-murder rule are no longer law.
- (3) Principals in the second degree and accessories before the fact to murder will now only be guilty if it is shown to the satisfaction of the jury that they had a common resolution with the principal in the first degree involving at least an intent to inflict grievous bodily harm, and the rulings in relation to the principal in the second degree in *R. v. Appleby*,¹¹ *R. v. Betts and Ridley*¹² will require amendment accordingly.¹³
- (4) The special case of death resulting from a suicide pact and its difficulties in relation to transferred malice is dealt with below.

would seldom, if ever, be convicted of murder unless there was evidence that he had wilfully put life in jeopardy . . . We think that in this matter further progress may be left to the courts and to the development of the common law.”

⁶ [1909] 1 K.B. 895, 899. One point which tended to cause confusion of the two standards was the suggestion that because wounding and causing grievous bodily harm with intent to cause grievous bodily harm was a felony under s. 18 of the Offences against the Person Act an injury sufficient for this felony would be sufficient for murder under the felony-murder rule (*cf.* Stephen, *Digest*, pp. 479-480). This has been eliminated by the enactment of s. 1, Homicide Act. *Cf. R. v. Vickers*.

⁷ [1949] 2 All E.R. 662.

⁸ (1887) 16 Cox C.C. 311.

⁹ [1909] 1 K.B. 895, 899.

¹⁰ [1920] A.C. 479.

¹¹ (1940) 28 Cr.App.R. 1.

¹² (1930) 22 Cr.App.R. 148.

¹³ This is quite apart from the Homicide Act, s. 5 (2) where an accomplice guilty of murder will not be guilty of capital murder where the murder falls within s. 5 (1) unless he by “his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him.”

(b) *Diminished Responsibility*

Section 2 of the Act introduces a new defence of diminished responsibility into English law where on a charge of murder the defence proves that the accused was "suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as *substantially* impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." The effect of proof of diminished responsibility is to reduce the quality of the crime from murder requiring an obligatory sentence of death in the case of capital murder or life imprisonment in the case of non-capital murder to manslaughter where the sentence is in the discretion of the court and may range from fine through any term of imprisonment to life imprisonment. The introduction of this defence borrowed from the law of Scotland is one of the most interesting features in the Act. Prior to the Act a person's mental state at the time of the crime affected liability (a) as a defence if there was insanity which fell within the narrow limits of the M'Naghten Rules, when there would be an acquittal in the form of "guilty of the act or omission charged against him but insane at the time," or (b) in the special case within the Infanticide Act, 1938, where a mother could be found guilty of infanticide in circumstances which would otherwise have amounted to murder. The test for infanticide was the broad one "whether the balance of her mind was disturbed" by reason of birth or lactation consequent on birth. The Homicide Act, 1957, introduced into English law by a statutory provision the Scottish common law doctrine of diminished responsibility with a definition and adaptations to suit its statutory birth and the substantive and procedural differences between the two countries. The differences between this new defence and the defence of insanity within the M'Naghten Rules, which still remains available, are:—

- (a) that insanity within the M'Naghten Rules is a defence to any crime and results in acquittal, whilst the new defence is a defence only to murder and does not exculpate but only reduces the conviction to a conviction for manslaughter instead of murder¹⁴;
- (b) and—the most important practical difference—that within the requirements specified in section 2 the new defence

¹⁴ This may have civil consequences, *e.g.*, as regards succession to the property of the deceased.

covers forms of insanity and mental abnormality not within the M'Naghten Rules.¹⁵

The specified requirements for the defence are "such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury¹⁶) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing." The following suggestions are made as to the meaning and effect of these requirements. It is likely that there will have to be medical evidence of the abnormality of mind, its causes, and effects. In Scotland the emphasis has been on the conditions "that there must be aberration or weakness of mind which is bordering on though not amounting to insanity,"¹⁷ "running through the cases there is implied that there must be some form of mental disease" and not psychopathic personality *per se*.¹⁸ It is already clear that the English courts are looking to the Scottish decisions for guidance, *cf. R. v. Dunbar*,¹⁹ where Lord Goddard C.J. stated "It is a defence which the Act has borrowed from the law of Scotland and the judge's direction was quite in accordance with the directions given by the Lords of Justiciary and in particular we would refer to the charge of the Lord Justice-Clerk, afterwards Lord Justice-General (Lord Cooper) in *H.M. Advocate v. Braithwaite*."²⁰ The abnormality of mind required will exclude bad temper, unusual excitability, lack of self control, jealousy.²⁰

¹⁵ The Royal Commission on Capital Punishment spoke of certifiable insanity as meaning "that the patient is suffering from a major mental disease (usually a psychosis) to such a degree that restriction of his liberty is justified in his own or the public interest and he can therefore be properly certified under the Lunacy Acts": R.C.C.P. § 212.

¹⁶ The words in brackets are possibly limitative words defining the abnormality of mind, *cf. Hansard H.C. Deb. (1956-1957) Vol. 560, c. 1252 (The Att.-Gen.)*. They borrow from the wording of the Mental Deficiency Act, 1927, s. 1 (2). It is clear that s. 2 of the Homicide Act will cover mental deficiency causing diminished responsibility, whereas for insanity within the M'Naghten Rules the Royal Commission on Capital Punishment regarded it as doubtful. The words "inherent causes" would seem to mean abnormality of mind arising from causes existing in the mind as permanent attributes, *cf. O.E.D.* The words "disease or injury" are wide enough to cover disease or injury of any part of the body or brain which might affect the mind so as to cause abnormality. *Cf. R. v. Kemp [1957] 1 Q.B. 399; Hansard H.C. Deb. (1956-1957), Vol. 561, c. 486.*

¹⁷ *H.M. Advocate v. Savage* 1923 J.C. 49 approved *H.M. Advocate v. Braithwaite*, 1945 J.C. 55. See R.C.C.P. at p. 392. The references to bordering on insanity in Scottish judgments mean bordering on certifiable insanity.

¹⁸ *Carraher v. H.M. Advocate* 1946 J.C. 108. *Cf. R.C.C.P. § 313.* "The general consensus of psychiatric opinion does not regard an aggressive psychopath or a sadist—and still less a person who is hot-tempered or sexually unrestrained—as suffering from insanity or mental disease, and though it might sometimes be possible to find medical witnesses prepared to express such views, their evidence would be unlikely to find favour with the jury." And see R.C.C.P. § 401, and *Smith [1957] Crim.L.R. 359-360.*

¹⁹ [1957] 3 W.L.R. 330, 333.

²⁰ *H.M. Advocate v. Braithwaite* 1945 J.C. 55.

If, however, there is present a sufficient abnormality of mind within section 2 then, although section 3 retains for provocation the test of the reasonable man, a weak-minded person may have a defence of diminished responsibility.²¹ Moreover, section 2 will cover irresistible impulse arising from disease of the mind or mental deficiency, *i.e.*, the state of mind resulting from "a disorder or emotion such that while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent committing it."²² This, so long argued as being the minimum necessary extension of the M'Naghten Rules, will now at least give a defence of diminished responsibility.

Section 2 (2) follows for diminished responsibility the rules that apply for insanity within the M'Naghten Rules at common law, *i.e.*, that it is for the defence to prove diminished responsibility. It has already been laid down by the Court of Criminal Appeal in *R. v. Dunbar*²³ that the burden on the defence is only to satisfy the jury that the preponderance of probability is in favour of the defence following *R. v. Carr-Briant*.²⁴ There will be the difficulty that the defence will not be able to be raised unless the accused consents, as neither for insanity within the M'Naghten Rules nor for the new defence of diminished responsibility has the prosecution power to raise the issue of insanity nor is there provision for the judge to raise the issue in the absence of evidence called by the defence.²⁵

The development of the practical relationship of the new defence of diminished responsibility with the defence of insanity within the M'Naghten Rules will be an interesting and important question. The strictness of the M'Naghten Rules with regard to disease of the mind and the difficulties that arise in relation to insanity not affecting the reason or the intellect do not apply to diminished responsibility. Apart from cases where a technical acquittal is important, diminished responsibility has the advantage of the possibility of a lighter sentence, a sentence in the discretion of the court²⁶ as against detention as a Broadmoor patient during Her Majesty's pleasure. Nevertheless it is not thought that the

²¹ *Cf. R. v. Lesbini* [1914] 3 K.B. 1116, *R. v. Alexander* (1913) 9 Cr.App.R. 139 and *quaere* whether in such cases a defence of diminished responsibility would not now be available, its chances of success depending on the degree of abnormality of mind present.

²² §§ 264, 308 R.C.C.P., and Recommendation 18 R.C.C.P. at p. 276.

²³ [1957] 3 W.L.R. 330.

²⁴ [1943] K.B. 607.

²⁵ Such a power in the judge was recommended by the Royal Commission, see R.C.C.P. Recommendation 36. And see *R. v. Kemp* [1957] 1 Q.B. 399 as to when the defence may be regarded as having raised the issue.

²⁶ Although life imprisonment seems to have been imposed in the cases which have arisen so far.

M'Naghten Rules and the defence of insanity will be rendered obsolete. In crimes other than murder they remain as the only defence on the grounds of insanity, and in murder there may be practical considerations requiring a technical acquittal. Moreover, a question that will be important in this connection will be whether the trial judges will regard in appropriate cases evidence led by the defence to show diminished responsibility as in fact raising the issue of insanity within the M'Naghten Rules.²⁷

In conclusion it seems that if a person charged with murder is alleged to be insane three different tests of insanity²⁸ are applicable at three different stages of the proceedings and in addition there is the defence of diminished responsibility. The test to be applied by the jury to determine whether the accused should be found insane on arraignment is whether he is fit to plead, to understand the proceedings and to instruct counsel. Where insanity under the M'Naghten Rules is applicable as a defence, the test is whether the accused at the time when the act was committed was labouring under such a defect of reason from disease of the mind that he did not know the nature and quality of his act or did not know that it was wrong, and success of the defence results in acquittal. In cases of insanity within the requirements of severe abnormality of mind under section 2, Homicide Act, 1957, the test is whether his mental responsibility is substantially impaired, and success of the defence results in a conviction for manslaughter. In addition there is the test applied by the Home Secretary in deciding whether he is precluded on the grounds of insanity from allowing the prisoner to go to execution where there has been a death sentence for capital murder and this is whether the accused is certifiable as insane.

(c) *Provocation*

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or things said or by both together) to lose his

²⁷ See *R. v. Kemp* [1957] 1 Q.B. 399; Trial of Lunatics Act, 1883, s. 2. Hansard H.C.Debs. (1956-1957) Vol. 560, c. 1252, where the Attorney-General said: "if the defence raise any question as to the accused's mental capacity and evidence is called to show that he is suffering from a serious abnormality of mind, then if the evidence goes beyond a diminution of responsibility and really shows that the accused was insane within the M'Naghten Rules it would be right for the judge to leave it to the jury to determine whether the accused was, to use the old phrase, 'guilty but insane' or to return a verdict of manslaughter on the basis that although not insane he suffered from diminished responsibility." As to recall of Crown witnesses, see Glanville Williams, *Criminal Law: The General Part*, p. 311, footnote 3, and see Griew, "Diminished Responsibility and the Trial of Lunatics Act, 1883," [1957] Crim.L.R. 521-529.

²⁸ R.C.C.P. § 288 and see Jackson, 11 C.L.J. 57-66.

self-control the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man": Homicide Act, s. 3.

This provision alters the law by means of a legislative direction to judge and jury. Certainly the section makes it clear that provocation by words is to be treated in the same way as provocation by acts—"whether by things done or things said or by both together." The intent seems to be to alter the law as to the respective functions of judge and jury in relation to provocation as stated by Viscount Simon in *Holmes v. D.P.P.*²⁹ and to lay down for the future that where there is evidence sufficient to be left to the jury that the accused was provoked to lose his self-control and to do what he did under such loss of self-control, then the question as to whether the provocation was sufficiently grave to make a reasonable man lose his self-control is to be left to the jury to determine as a question of fact. Cases withdrawing particular types of provocation from the jury on the ground that as a matter of law it did not amount to such provocation as would deprive a reasonable man of his self-control will now have to be reconsidered in the light of the new section,³⁰ the wording of which is wide and seems to remove any arbitrary limits as a matter of law. The cases governing the reasonable man test will all still apply in so far as they lay down the appropriate direction for the jury, *e.g.*, *Bedder v. D.P.P.*³¹ (the test does not take account of peculiar physical qualities), *R. v. McCarthy*³² (nor drunkenness).

(d) *Suicide Pacts*

Section 4 provides that it shall be manslaughter not murder where a person acting in pursuance of a suicide pact kills the other or is a party to the other killing himself. Suicide pact is defined as "a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact." The section further provides that it shall be for the defence to prove that the person charged

²⁹ [1946] A.C. 588, 597.

³⁰ *e.g.*, confessions of adultery (*Holmes v. D.P.P.* [1946] A.C. 588).

³¹ [1954] 1 W.L.R. 1119.

³² (1954) 38 Cr.App.R. 74.

was acting in pursuance of a genuine suicide pact, and the courts will undoubtedly hold that this burden is that the balance of probabilities is in favour of the defence as in section 2. The section only applies where there is a suicide pact, so that where there is no such pact it will be murder where a person intends to kill himself and in the course of the attempt to kill himself kills another person, as in *R. v. Spence*.³³ The rulings in *R. v. Dyson*³⁴ as to showing that the deceased met her death in consequence of the pact and not, for example, by accident, and in *R. v. Croft*³⁵ as showing that the accused expressly countermanded or revoked the advising, counselling, procuring or abetting, will still apply to secure acquittal on the charge of murder or manslaughter.

PART II

LIMITATIONS ON LIABILITY TO DEATH PENALTY FOR MURDER

Clauses 5-9 limit the death penalty as the sentence for murder to certain classes of murder defined in the Act and replace the sentence of death for cases of murder outside the specified clauses by the sentence of imprisonment for life; "the sentence *shall* be one of imprisonment for life." The classes of murder to be called and to be charged as capital murder are specified in section 5. For capital murder and for cases where the convicted person has previously been convicted of murder the death penalty is retained as the sentence. Section 5 prescribes:—

"(5) Subject to subsection (2) of this section, the following murders shall be capital murders, that is to say

- (a) any murder done in the course or furtherance of theft³⁶;
- (b) any murder by shooting or by causing an explosion;
- (c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or assisting an escape or rescue from legal custody;

³³ (1957) 41 Cr.App.R. 80.

³⁴ (1823) R. & R. 523.

³⁵ [1944] 3 K.B. 295.

³⁶ "Theft" is defined in s. 5 (5) as "theft includes any offence which involves stealing or is done with intent to steal." Theft, which so far as England and Wales is concerned has not hitherto been a legal term but rather the popular term for the law's term "stealing," was apparently used instead of stealing because this part of the Act applies also to Scotland. The Government in the debates on the Bill justified the retention of the death penalty in the classes specified in section 5 on the grounds that they were the cases where it was most needed and effective, i.e., as a deterrent against professional criminals carrying lethal weapons and as a protection of public servants who are particularly exposed to attack. Hansard H.C.Deb. (1956-1957), Vol. 560, c. 1148.

- (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;
- (e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting."

Moreover section 5 (2) further limits capital murder and the death penalty even in cases of killings within the types specified, so far as accomplices *guilty of the murder* are concerned, to "anyone who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person in the course or furtherance of an attack on him."

The law of murder is of course the same, and is the common law of murder as amended by Part I of the Act, whether the murder is capital murder or non-capital murder. Hence any strict rulings of law made in non-capital cases will apply to the law governing capital cases and *vice versa*. The Act does not in any way introduce degrees of murder. There is one law of murder, based on the common law requirements of murder as amended by Part I of the Act. It is to be remembered also that even with regard to murder where the death penalty has to be imposed as the sentence of the court there is still the reserve of the Royal Prerogative of Mercy.

SHAREHOLDERS' RIGHTS AND THE RULE IN *FOSS v. HARBOTTLE*

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IF an irregularity has been committed in the course of a company's affairs, or some wrong has been done to the company, can the individual shareholder bring a complaint before the court? The Rule in *Foss v. Harbottle*¹ purports to give a negative answer to this question, subject to certain "exceptions." The answer need occasion no surprise when it is remembered that the judges have for long been reluctant to interfere in the internal affairs of companies and similar associations; they have usually abdicated their jurisdiction in favour of the obvious alternative authority—the majority of the members. "It is not the business of the court to manage the affairs of the company. That is for the shareholders and the directors."² Whether this approach is a wholly adequate basis for judicial policy in the area of modern company law is open to doubt; the "majority" in the modern public company is usually under the effective control of a small body of managers. But the approach of the courts remains the same; the interests of the majority are theoretically paramount in the last resort. The rights of the minority must, in consequence, be restricted; and, in particular, the minority cannot complain of wrong done to the corporation as a whole or of internal improprieties. In such terms of deceptive simplicity is the Rule in *Foss v. Harbottle* often presented; but the Rule is notorious among students of company law for the difficulties which lie underneath this simple surface. In order to investigate those difficulties, it is necessary, first, to examine the two different parts of the Rule and their point of contact; secondly, to mention two preliminary matters concerning directors which must be kept in mind in the course of the discussion; and thirdly, to set out, and examine under four headings, the principles which are commonly said to constitute the "exceptions" to the Rule.

THE RULE

"It is an elementary principle of the law relating to joint stock companies," said Lord Davey in 1902,³ "that the court will not

¹ (1843) 2 Ha. 461.

² Scrutton L.J., *Shuttleworth v. Cox Bros. & Co.* [1927] 2 K.B. 9, at p. 23.

³ *Burland v. Earle* [1902] A.C. 83, 93 (P.C.).

interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle*⁴ and *Mozley v. Alston*.⁵ The two principles are usually referred to compositely as "the Rule in *Foss v. Harbottle*," and their importance has been emphasised by judges for over 100 years. Without them, it is said, futile actions,⁶ oppressive litigation⁷ and multiplicity of suits⁸ would ensue; and companies would be "torn to pieces" by litigation.⁹ For a Rule of such importance, however, it is unfortunate that "the language by which it is expressed varies so much that it is by no means easy to reconcile the whole of any one judgment with every other"¹⁰; and the same is "equally true of textbooks"¹⁰—and as true in 1957 as it was in 1908.¹¹ In order to disentangle the threads of the Rule, and its so-called "exceptions" the two principles of which it is composed must first be distinguished. *Foss v. Harbottle* was decided in 1843, one year before the first modern Companies Act, which allowed the joint-stock, "deed of settlement company" (in law still a partnership solving some, but not all, of its problems by means of the trust), to acquire incorporation by mere registration.¹² The registered company was in origin "a hybrid growth . . . a partnership which has been invested with the character of incorporation"; and it is not, therefore, surprising that the "rules which are applicable are partly referable to both characters."¹³ One of the two parts of the Rule in *Foss v.*

⁴ (1843) 2 Ha. 461.

⁵ (1847) 1 Ph. 790.

⁶ *Foss v. Harbottle* (*supra*) p. 494; *Bagshaw v. E. Union Ry. Co.* (1849) 7 Hare 114. 180 (affd. (1850) 2 Mac. & G. 389).

⁷ *Cray v. Lewie* (1873) 8 Ch.App. 1035, 1050-1051.

⁸ *Mozley v. Alston* (*supra*) 793; *Lord v. Copper Miners Co.* (1848) 2 Ph. 740. 752; *MacDougall v. Gardiner* (No. 2) (1875) 1 Ch.D. 13. 25.

⁹ *La Cie. de Mayeille v. Whitley* [1896] 1 Ch. 788, 807. Kay J.J.

¹⁰ *Kekewick J., Normandy v. Ind Coope & Co., Ltd.* [1908] 1 Ch. 84, 106.

¹¹ See Gower, *Modern Company Law* (1954) 267-270, 482-485; Buckley, *Companies Acts*, 12th ed., 168-169; *Palmer's Company Precedents*, 17th ed., Part 1. 1096 *et seq.*; Gore-Brown, *Handbook on Joint Stock Companies*, 41st ed., 382-386; *Halsbury's Laws of England*, 3rd ed., Vol. 6. 418-420, 445-449; *Palmer's Company Law*, 19th ed., 229. The writer wishes to express his great indebtedness to Professor L. C. B. Gower for his assistance in discussing the problems raised in this article. It must be added that the writer is aware that the views cited from Prof. Gower's book will not necessarily represent his opinions in the forthcoming second edition of that work. (That edition has now appeared after this article went to press.)

¹² Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110). See Gower, *op. cit.*, Chaps. 2 and 3, and sources there cited. Limited liability was not, of course, added until 1855 (18 & 19 Vict. c. 133).

¹³ *Jordan C.J. in Austerton Coal & Shale Employees Fedn. v. Smith* (1937) 38 S.R. (N.S.W.) 48, 53.

Harbottle has its roots in the law relating to corporations; the other derives from partnership principles.

Sources of the Rule

The corporation principle, that "the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association"¹⁴ of persons is *prima facie* the company or association itself,"¹⁵ springs naturally from the treatment in law of the corporation as a "person" separate from the members of which it is composed; and it was well established by the nineteenth century that "the individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation' as any others of his Majesty's subjects are,"¹⁶ Thus, injuries allegedly caused to the corporation, not only by outsiders, but also by its own directors where their duties are owed to the corporation alone and not to its members, must be remedied not by the members but by corporate action. That was the decision in *Foss v. Harbottle* itself.¹⁷ So, where persons "usurped" the office of director, this was said to be an "invasion of the rights of the corporation," and the result was held to be the same.¹⁸

The second principle springs from a partnership doctrine which was already marcescent at the time when it was taken over. In the early years of the nineteenth century "courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose of *dissolving the partnership*," it being "no duty of the court to settle all partnership squabbles."¹⁹ "This Court," exclaimed Lord Eldon, defending the old principles, "is not to be required on every Occasion to take the Management of

¹⁴ This rule applies to any association which is a "legal entity capable of suing in its own name, and which is composed of individuals bound together by rules which give the majority of them the power to bind the minority," *Romer J., Cotter v. Nat. Union of Seamen* [1929] 2 Ch. 58, 71 (affd. C.A. *ibid.* 93); e.g., a registered trade union or friendly society, (*Kirsopp v. Highton* (1911) 28 T.L.R. 129, 493).

¹⁵ *Jenkins L.J., Edwards v. Halliwell* [1950] 2 All E.R. 1064, 1066.

¹⁶ *Alderson B., Bligh v. Brent* (1837) 2 Y. & C.Ex. 268, 295. See, too, *Soc. of Practical Knowledge v. Abbott* (1840) 2 Beav. 559; *Blackburn v. Japson* (1823) 3 Swans. 132, 138; *R. v. Patrick* (1785) 1 Leach 253; *Cooch v. Goodman* (1842) 2 Q.B. 580; *Att.-Gen. v. Wilson* (1840) Cr. & Ph. 1. On earlier developments, see Holdsworth, H.F.L. III, pp. 482 *et seq.*, VIII, pp. 202 *et seq.* The conclusive step on registered companies was, of course, taken in *Salomon v. Salomon* [1897] A.C. 22.

¹⁷ (1843) 2 Ha. 461 (a statutory corporation). See, too, *Dominion Cotton Mills Co., Ltd. v. Amyot* [1912] A.C. 546; *Parlides v. Jensen* [1956] Ch. 585; and *Burland v. Earle* itself (*supra*).

¹⁸ *Mozley v. Alston* (1847) 1 Ph. 790, 800, *per* Cottenham L.C.; *Hattersley v. Earl of Shelbourne* (1862) 7 L.T. 650, 653.

¹⁹ *Lindley, Law of Partnership* (1st ed. 1860), Vol. II, p. 752, 753 (italics supplied).

every Playhouse and Brewhouse in the Kingdom.”²⁰ Even by 1844, however, an extension of Chancery jurisdiction by more liberal use of the remedies of account and injunction was apparent, and the modern partnership rule is not represented by remarks of this character.²¹ But the earlier approach *was* taken over by the judges in dealing with the internal affairs of the trading companies, which were, after 1844, incorporated. Thus a rule which began by being “*extended* to companies” to ensure that courts of equity would “not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation,”²² resulted in one which, after partnership law had moved on, applied primarily to “disputes between the members of companies.”²³ This is the unsatisfactory origin of Lord Davey’s proposition to the effect that the court has no jurisdiction in matters of “internal management.”

Once established, however, the principle was applied rigorously to the many “irregularities” committed by those managing joint stock companies. So, individual members could not complain of calls made within the directors’ powers but allegedly “unfairly” made²⁴; of an irregular quorum at a directors’ meeting which summoned general meetings²⁵; of alleged improprieties in the conduct of meetings,²⁶ such as the chairman’s refusal to call a poll, even when the articles of association said that one should, in the events which occurred, be called.²⁷ These were matters of internal management and under the control of the majority. Thus “if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done

²⁰ *Carlen v. Drury* (1812) 1 V. & B. 154, 158; but even here there is evidence of an already changing attitude (p. 157). The matter was in the first half of the century “the subject of much difference of opinion”; Lord Cottenham L.C. in *Wallworth v. Holt* (1841) 2 Myl. & Cr. 619, 635. For the survival of the old approach, see *Smith v. Jeyes* (1841) 4 Beav. 503; *Marshall v. Colman* (1820) 2 J. & W. 266; *Richards v. Davies* (1831) 2 Russ. & M. 347.

²¹ *Wigram V.-C.*, who decided *Foss v. Harbottle*, firmly rejected the old partnership doctrine one year later in *Fairthorne v. Weston* (1844) 3 Ha. 387, 392. See, too *Watney v. Trist* (1876) 45 L.J.Ch. 412, 413; and for the position today, *Lindley, Partnership* (11th ed. 1950), pp. 571, 601 *et seq.*, 637 *et seq.*

²² *Lindley, op. cit.* (1st ed. 1860), 754 (italics supplied).

²³ *Lindley, op. cit.* (11th ed. 1950) 573.

²⁴ *Bailey v. Birkenhead, etc., Ry. Co.* (1850) 12 Beav. 433; *Anglo-Universal Bank v. Baragnon* (1881) 45 L.T. 362; but if “fraud” can be shown, see *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56, discussed below.

²⁵ *Southern Counties Deposit Bank, Ltd. v. Rider* (1895) 73 L.T. 374. See, too, *Browne v. La Trinidad* (1887) 37 Ch.D. 1, 17; *Campbell v. Australian Mutual Soc.* (1908) 77 L.J.P.C. 117.

²⁶ *Amal. Soc. of Engineers v. Jones* (1913) 29 T.L.R. 484; *Cox v. N. U. of Foundry Workers* (1928) 44 T.L.R. 345; *Cotter v. N. U. Seamen* [1929] 2 Ch. 58. Cf. *Lord v. Copper Miners Co.* (1848) 2 Ph. 740.

²⁷ *MacDougall v. Gardiner* (No. 2) (1875) 1 Ch.D. 13 (compare the previous action in (1875) 10 Ch.App. 606).

irregularly which the majority of the company are entitled to do regularly . . . there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.”²⁸ The law had long recognised majority rule as a fundamental principle concerning corporations,²⁹ so that there was no difficulty in expressing majority rule as the *justification* for the refusal to interfere in internal management. Whatever the ordinary majority of members could ratify was a matter outside the purview of the court. Internal affairs were for the majority to decide. In that way, the partnership principle could be merged into the corporation rule. The majority which decided disputes about internal management was also the traditional authority for deciding whether or not the corporation should bring an action in order to remedy a wrong committed against it. Majority rule naturally applied to decisions about legal proceedings. For instance, they might decide not to sue an officer of the company who was in breach of duty. So, where the minority alleged that the directors had negligently sold the company’s assets at an undervalue, “it was open to the company by a vote of the majority to decide that . . . proceedings should not be taken by the company against the directors”³⁰ and the minority had no *locus standi* as plaintiff. Such a plaintiff is faced, it has been said, with “a dilemma”: either the majority are with him, in which case the plaintiff should be the corporation; or they are not, in which case no action lies.³¹ In the same way, an internal “irregularity” can be expressed in terms of a “wrong against the corporation” alone, *because* the majority might regularise it by adoption,³² thus combining the two principles.

The Real Nature of the Rule

It is, then, plain that beneath the two parts of it there is, after all, one “Rule in *Foss v. Harbottle*”; and the limits of that Rule lie along the boundaries of majority rule.³³ At first sight, this is a terrifying prospect for the minority, since it has been asserted

²⁸ *Ibid.* per Mellish L.J., p. 25, adopted in *Burland v. Earle* [1902] A.C. 94. See, too, *Harben v. Phillips* (1883) 23 Ch.D. 14, 39; and the second proposition of Jenkins L. J. in *Edwards v. Halliwell* [1950] 2 All E.R. p. 1066.

²⁹ *R. v. Varlo* (1775) 1 Cowp. 248, 250; *Att.-Gen. v. Davy* (1741) 2 Atk. 212.

³⁰ Danckwerts J., *Parlides v. Jensen* [1956] Ch. 565, 576; and see *Re Transvaal Gold Exploration Co.* (1885) 1 T.L.R. 604.

³¹ per Russell L.J. in *Cotter v. N. U. Seamen* [1929] 2 Ch. p. 111.

³² e.g., James L.J. in *MacDougall v. Gardiner* (*supra*), pp. 22–23. This is also one way of explaining *Mozley v. Alston* (*supra*).

³³ See the most clear statement by Lord Cranworth in *Davidson v. Tulloch* (1860) 3 McQ. 783, 796–797 (H.L.Sc.), and *Orr v. Glasgow, etc., Ry.*, *ibid.*, 799, 804; Kay J. in *Studdert v. Grosvenor* (1886) 33 Ch.D. 528, 535.

that the majority can ratify³⁴ any act which is *intra vires* the corporation itself, even if it be an act in breach of the internal agreement, *i.e.*, in the case of a company, the articles of association.³⁵ Thus, the majority can ratify past acts of the directors which offended the procedure demanded by the articles and exceeded the directors' powers³⁶ (provided the acts were not *ultra vires* the company), even though they would need to change the articles by special resolution³⁷ in order to confer on the directors extended powers for the future. It is here, however, that the inconsistencies and gaps in our case law begin to be apparent. The majority is not as powerful as these cases suggest. As Vaughan Williams L.J. has said, "there are matters which are *intra vires* [the company] but yet are of such a character that the majority cannot bind the minority."³⁸ This is certainly true where the majority perpetrates "a fraud on the minority," or, more strictly, "a fraud on the company"³⁹; but the rule stated by Vaughan Williams L.J. is not limited to cases of fraud. Indeed, it will be argued in this article that, contrary to the view expressed in cases already cited, *prima facie* no breach of the articles is open to ratification; that only a few such "irregularities" are within that power of the majority; and that the limits of ratification and, therefore, of the Rule in *Foss v. Harbottle*, may be much more narrowly defined than is sometimes believed. In order to investigate that matter we must look at the so-called "exceptions" to the Rule. Before we can do so, two preliminary points must briefly be made.

THE MAJORITY AND THE DIRECTORS

First, the practical importance of the Rule is increased by the principle, established in *North-West Transportation, Ltd. v. Beatty*, that, unless the articles otherwise provide, "a shareholder is not

³⁴ "Ratification," in this article refers to confirmation by *ordinary* majority. As to ratification by *all* the shareholders, see Buckley, *op. cit.* pp. 823 *et seq.* and cases cited there; and *Re London and N.Y. Corpn.* [1895] 2 Ch. 860.

³⁵ *Cotter v. N. U. Seamen*, *supra*, p. 107. Lawrence L.J. Alterations of the terms of the articles require a *special* resolution; and, in that respect, the dicta of Kekewich J. in *Normandy v. Ind. Coope* [1908] 1 Ch. 84, 108, must go too far, although they also support the propositions in the text.

³⁶ *Grant v. U.K. Switchback Ry.* (1888) 40 Ch.D. 135; *Irvine v. Union Bank of Australia* (1877) 2 App.Cas. 366, 375-376 (P.C.). And see Romilly M.R. in *Kent v. Jackson* (1851) 14 Beav. 367, 382 (affd. 2 De G.M. & G. 49); and *Re Norwich Yarn Co.* (1856) 22 Beav. 143, 164.

³⁷ That is to say, a three-fourths majority obtained in compliance with s. 141 (2), Companies Act, 1948.

³⁸ Vaughan Williams L.J., *Kaye v. Croydon Tramways* [1898] 1 Ch. 358, 377; and see p. 375. See, too, the valuable survey in Lindley on *Companies* (6th ed.), pp. 774-775, and 781; and *Boschoek Proprietary Co. v. Fuke* [1906] 1 Ch. 148, discussed *infra*, p. 214.

³⁹ See Heading 4 of the Exceptions, *infra*. (In next issue.)

debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote."⁴⁰ Therefore, he may vote to ratify an act done by him as director (a sale, for example, to his company), and so help to validate, or indeed, personally validate, what was initially voidable by the company.⁴¹ When added to the other means at the disposal of directors for controlling the company, this principle has the paradoxical result of frequently turning the Rule in *Foss v. Harbottle* into a shield for the controllers, rather than a weapon for use by the members to secure the "shareholders' control" which it was meant to facilitate.⁴² The controllers can even use their votes as shareholders—"rights of property"⁴³ which they are enabled to use in their own interests—to prevent action against themselves.⁴⁴ Although the Companies Act, 1948, has introduced new weapons into the hands of members for use against the victors of the managerial revolution,⁴⁵ the principle of *North-West Transportation, Ltd. v. Beatty* is a powerful ally for the managers. In such a situation it often becomes particularly important for the minority of dissentient members to reach the haven of an "exception" to *Foss v. Harbottle*, so as to be entitled to sue whatever the majority cares to say. Anyone who thought that "shareholders' control" ought, today, to be more than a slogan would, as we shall see, probably find himself advocating a restrictive approach to the Rule; those who do not will need to look elsewhere for curbs on the controllers, but they also will probably favour an extension of the "Exceptions" to the Rule.

The second point also concerns directors. We have already seen that the court will not entertain actions by the minority in

⁴⁰ *Burland v. Earle* (*supra*) p. 94.

⁴¹ *North-West Transportation, Ltd. v. Beatty* (1887) 12 App.Cas. 589; *Ving v. Robertson & Woodcock* (1912) 56 S.J. 412. (*Quaere* whether the same is true at meetings of a class of members: see Gower, *op. cit.* p. 482, n. (7).) As Prof. Gower has pointed out, there seems to be no jurisdiction to call a meeting of "independent" shareholders only; *Mason v. Harris* (1879) 11 Ch.D. 97, 109.

⁴² *e.g.*, their control of proxy votes: see Gower, *op. cit.* 464, 479. Two cases of 1883 are good examples of the C.A. still struggling to avoid the change in function of the Rule: *Imperial Hydropathic Hotel v. Hampson* (1883) 23 Ch.D. 1 (where the minority were given the consolation of costs out of the company's funds), and *Harben v. Phillips* (1883) 23 Ch.D. 14 (a battle over proxy votes, resulting in a general meeting being ordered by the court, and a subsequent refusal by the court to issue an injunction to thwart the genuine majority).

⁴³ *Pender v. Lushington* (1877) 6 Ch.D. 70.

⁴⁴ See, *e.g.*, *East Pant Du United Lead Mining Co. v. Merryweather* (1864) 2 H. & M. 254.

⁴⁵ Especially s. 184 (1) which allows for the dismissal of a director at any time by ordinary majority (after "special notice," subs. (2), and subject to the director's right to damages for breach of contract, subs. (6)). See, too, ss. 136, 137, 165, 210. Such statutory remedies are not discussed in detail in this article.

respect of matters on which the majority can decide, largely because the result will only be that "a meeting has to be called, and then ultimately the majority gets its wishes."⁴⁶ One assumption beneath such a rule must be that the majority does ultimately control the use of the corporate name in litigation. That assumption underlies most of the early cases on *Foss v. Harbottle*,⁴⁷ and in some is exemplified in practice, when the view of the majority concerning litigation was actually expressed.⁴⁸ It is plain that anyone who starts an action in the name of the company runs the risk of having it struck out, and of being liable in costs, if he is shown not to have "proper authority" for his proceedings, and such authority may usually be obtained from either the directors or the members in proper assembly.⁴⁹ But it is, of course, usual today for the articles of association to delegate to the directors the management of many, or all, of the company's affairs⁵⁰; where this is so, it has been decided, within the last fifty years, that the registered company's shareholders in general meeting cannot interfere with the exercise of the directors' powers,⁵¹ although the majority can, since 1948, dismiss them.⁵² Does, therefore, an article delegating general management of the company, vest in the directors an exclusive right to start, discontinue, or prevent legal proceedings in the name of the company? Certain dicta in *Shaw and Sons (Salford) Ltd. v. Shaw*⁵³ suggest that this

⁴⁶ *MacDougall v. Gardiner* (1875) 1 Ch.D. 13, at p. 25 (chairman's refusal to call poll provided for in the articles; no action for minority).

⁴⁷ See e.g., *Exeter and Crediton Ry. v. Buller* (1847) 16 L.J.Ch. 449; *Pender v. Lushington* (1877) 6 Ch.D. 70; *Harben v. Phillips* (supra); *Imperial Hydro-pathic Hotel v. Hampson* (supra); *Duckett v. Gover* (1877) 6 Ch.D. 82, and 25 W.R. 554; *MacDougall v. Gardiner* (supra) p. 22 and (1875) 10 Ch.App. 606, 608-609. These cases show that the court has been prepared to take the necessary steps to discover the views of the majority. (See, too, *Marshall's Valve Gear Co. v. Manning* [1909] 1 Ch. 267.)

⁴⁸ See *Exeter & Crediton Ry. v. Buller* (supra); and *East Pant Du Mining Co. v. Merryweather* (1864) 2 H. & M. 254 (where, however, a minority action was possible; *Atwool v. Merryweather* (1867) L.R. 5 Eq. 464, 468 n.: see Exception 4, *infra*).

⁴⁹ *Lindley L.J. La Cie de Mayville v. Whitley* [1896] 1 Ch. 788, 803. Improper proceedings may be ratified: *Danish Mercantile Co., Ltd. v. Beaumont* [1951] Ch. 680.

⁵⁰ e.g., Table "A," article 80.

⁵¹ *Automatic Self-Cleansing Filter Syndicate v. Cunningham* [1906] 2 Ch. 34; *Quin & Axtens v. Salmon* [1909] A.C. 442; *Scott v. Scott* [1943] 1 All E.R. 582; *Grundt v. Great Boulder Mines, Ltd.* [1948] Ch. 145. See the development described by Hornsey (1950) 13 M.L.R. 474-477. The rule does not operate if there is no board which can act: *Barron v. Potter* [1914] 1 Ch. 895; *Foster v. Foster* [1916] 1 Ch. 532.

⁵² s. 184, Companies Act, 1948: this is, in itself, rather less than the control envisaged in the earlier cases cited, *ante*, n. (47).

⁵³ [1935] 2 K.B. 113, 134 (Greer L.J.), 143 (Slesser L.J.). Those who take this view can also point to the discussion by Wigram V.C. in *Foss v. Harbottle* itself, as to the exact powers of the directors: (1843) 2 Ha. pp. 492-493. The particular terms of the articles in question will always be critical; but powers of "general management" have often been very widely construed: e.g., *Campbell v. Rofe* [1933] A.C. 91, 99.

is the case. If they are correct one assumption, at least, underlying the *Foss v. Harbottle* cases has been smashed. If today directors usually have exclusive control of corporate actions, the approach to that part, at least, of the Rule which relates to the need for action in the name of the company might have to be reconsidered.

Two reasons, however, may be advanced for thinking that this is not the case. In the first place, the most recent cases appear to support the old view as to what is "the well-settled practice of the court" when a dispute arises about a plaintiff's right to use the company's name. It is "to adjourn any motion brought to strike out the company's name with a view to a *meeting being called* to see whether the company desires the action to be brought or not."⁵⁴ It is, in consequence, still a widely held view that majority rule prevails in this sphere, unless the articles contain express provisions to the contrary⁵⁵; and the creation by section 184 of the new power to dismiss directors at any time by ordinary resolution is another reason for supporting that conclusion. Secondly, even if the dicta in *Shaw's* case must be accepted and the shareholders cannot stop the directors, under such an article, from launching a corporate action,⁵⁶ it might, perhaps, be decided that the directors could not, on their side, stop the majority from bringing a corporate action even though general management had been delegated under the articles—a conclusion which might be enough to save the Rule in *Foss v. Harbottle* from utter destruction by this side wind. Furthermore, it has frequently been said that a minority, even under an exception to the Rule, ought not to sue in defence of the corporation's rights until it has tried to get the company to sue.⁵⁷ A refusal by the "proper authority" will then often suffice to bring the minority under the fourth "Exception," discussed below, of "fraud on the minority." Where directors are given powers of management, their refusal to sue for a wrong done to the company, in the face of a majority decision to do so,

⁵⁴ Jenkins L.J. in *Danish Mercantile Co., Ltd. v. Beaumont* (*supra*) pp. 686-687; where it is plain that he means a meeting of members; and Danckwerts J. in *Pavlidis v. Jensen* (*supra*) pp. 576-577 (where it is true that the *directors* themselves were defendants). Gower, *op. cit.*, p. 131, regards the practice as one "based on a fallacy" in view of the dicta in *Shaw's* case. But it may indicate that those dicta should not be accepted.

⁵⁵ See e.g., *Palmer's Company Precedents*, 17th ed., Vol. 1, p. 1100.

⁵⁶ Which is the point in the *Shaw* case (*supra*). The suggestion allows both sides initiative, and denies both a veto; this could conceivably be fitted into the case-law; but no great confidence is advanced for the likelihood of the suggestion becoming law.

⁵⁷ e.g., *Morris v. Morris* [1877] W.N. 6; *Ferguson v. Wallbridge* [1935] 3 D.L.R. 66, 83-84, Lord Blanesburgh (P.C.); *Orr v. Glasgow etc., Ry.* (1860) 3 Macq. 799.

might be evidence of "fraud" by them when in control.⁵⁸ Indeed, in spite of what has been said in this paragraph, such an allegation may be the only hope if the articles have *expressly* granted to the directors sole control of all legal proceedings; in that case, as we shall see, the members would be contractually bound not to interfere. "Fraud" by those in control is a matter to which we shall return under Heading 4 of the exceptions discussed below.

THE EXCEPTIONS

The "exceptions" to the Rule in *Foss v. Harbottle* are essentially not exceptions at all. They appear to be situations in which there is no chance of confirmation by the majority, and in which, therefore, the Rule cannot apply. There is not always agreement upon their exact nature, but we may take as a list of Headings those offered by Jenkins L.J. in *Edwards v. Halliwell*⁵⁹:—

Heading 1. *Ultra Vires and Illegality*:

"Where the act complained of is wholly *ultra vires* the company or association, the rule has no application"; (and the same is true where the act is "illegal").

Heading 2. *Special Majorities*:

Where the matter is one "which could validly be done or sanctioned not by a simple majority of the members . . . but only by some special majority," the Rule is ousted.

Heading 3. *Personal Rights*:

Where "the personal and individual rights of membership of (the plaintiff) have been invaded," the Rule "has no application at all."

Heading 4. "Fraud" by those in Control:

"Where what has been done amounts to what is generally called . . . a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others," because, otherwise, "the wrongdoers themselves, being in control, would not allow the company to sue."

⁵⁸ This may be the meaning of Buckley's explanation of *Marshall's Valve Gear Co. v. Manning* (*supra*): *Companies Acts*, 12th ed., p. 860 n. (f). But see the contrary argument put later based upon ss. 132 and 184 of the Companies Act, 1948, *infra*, under Heading 4. And compare *Smith v. Bank of Victoria* (1872) 41 L.J.P.C. 34, 39.

⁵⁹ [1950] 2 All E.R. at p. 1067; the order of the list as given here is different from the order in which the exceptions are stated by Jenkins L.J.

It will be noticed that Jenkins L.J. himself suggests that none of the first three Headings involves any "exception" to the Rule in *Foss v. Harbottle*. The Rule "has no application," because it cannot apply.

It will be seen, as our discussion develops, that Headings 2 and 3 are more concerned with the "partnership limb" of *Foss v. Harbottle*, whereas Heading 4 is concerned with the "corporation principle," and may possibly involve a real "exception." Other real exceptions have been suggested, such as that the rule will always be relaxed "where the interests of justice require the rule to be dispensed with."⁶⁰ But Danckwerts J. recently opined that such dicta cannot be used to extend the exceptions beyond those already well recognised⁶¹; and this is understandable if they are *not* real exceptions but a definitive list of situations outside the scope of the Rule. Indeed, many cases have recognised only Headings 1 and 4 of the list set out above.⁶² It may still be arguable that a residual "exception" can be found where the voice of the majority cannot be discovered, or cannot be properly expressed (*e.g.*, because of lack of notice of meetings)⁶³; but the list set out appears to be the widest that can reasonably be derived from the cases in which the matter is fully discussed.

Heading 1. *Ultra Vires* or *Illegal Acts*

It is plain that the minority can sue in this case because the majority cannot ratify an act *ultra vires* the company; and *a fortiori* the same reasoning will be applied to acts which are not merely outside the powers of one company, but "illegal" in the sense of impossible for any registered company,⁶⁴ or prohibited under the general law.⁶⁵ In such a case, a shareholder has a right of

⁶⁰ Sir George Jessel M.R. in *Russell v. Wakefield Waterworks Co.* (1875) 20 Eq. 474, 482; and see *Foss v. Harbottle* (1843) 2 Ha. at p. 492.

⁶¹ *Pavlides v. Jensen* [1956] Ch. 565, 574-576.

⁶² *e.g.*, *Burland v. Earle* [1902] A.C. 83, 93; *Dominion Cotton Mills v. Amyot* [1912] A.C. 546; *Gray v. Lewis* (1873) 8 Ch.App. 1035, 1051.

⁶³ See Finlay J. in *Humphries v. Auckland Tailoresses' etc. Union of Workers* [1950] N.Z.L.R. 380, 386, discussing *Kaye v. Croydon Tramways Co.* [1898] 1 Ch. 358, and *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503 (a difficult line of cases: see *infra*, p. 211, n. (15)). [See, too, *Featherstone v. Cook* (1873) L.R. 16 Eq. 298. But compare: *West End Hotels, Ltd. v. Bayer* (1912) 29 T.L.R. 92; *Grundt v. Great Boulder Mines, Ltd.* [1948] Ch. 145; *Channel Collieries, Ltd. v. Dover etc. Ry.* [1914] 2 Ch. 506, 510.]

⁶⁴ *e.g.*, infringements of the rules regarding maintenance of capital: *Hope v. International Financial Soc.* (1876) 4 Ch.D. 327 (purchase of company's own shares); *Ooregum Gold Mining Co. v. Roper* [1892] A.C. 125 (shares at a discount); *Bellerby v. Rowland & Marwood's* [1902] 2 Ch. 14.

⁶⁵ *Powell v. Kempton Park Racecourse Co.* [1897] 2 Q.B. 242, 260, 268. "Illegality" and "*ultra vires*" are frequently confused (*e.g.*, in *Cockburn v. Newbridge Sanitary Steam Laundry* [1915] 1 Ir.R. 237). But there are some breaches of statutes which, although "illegal," do not fall under this heading: see Buckley J. in *Anderson v. Midland Ry.* [1902] 1 Ch. 369, 376; *sed quare*.

action, primarily for a declaration or injunction to restrain the act in question, suing either on his own behalf alone,⁶⁶ or in a representative action on behalf of himself and all the other shareholders of the company, except any who are joined as defendants.⁶⁷

The form of minority actions: We must here advert to the three different types of action which are possible when *Foss v. Harbottle* does not apply. They are:—

- (a) a “personal” action: i.e., one brought to enforce a right personal to the plaintiff; here, unless he has a common interest with other shareholders, as in (b), he must *not* use a representative action⁶⁸; or
- (b) a “true” representative action⁶⁹: i.e., one in which the plaintiff and the other shareholders, or a class of them, have a common interest, and he sues on behalf of all⁷⁰; or
- (c) a “corporate” action: i.e., one which takes the form of a representative action, but which is permitted to him not in order to defend his or his fellow shareholders’ rights, but to defend the corporation’s rights:— a “corporate,” and not a personal, action.⁷¹

Whereas the first two, (a) and (b), are actions of a normal character, the third type is not. It is allowed in cases of *ultra vires*, and also in cases of “fraud” under Heading 4, “in order to give a remedy for a wrong which would otherwise escape redress.”⁷² It can be seen that the representative character of

⁶⁶ *Simpson v. Westminster Palace Hotel Co.* (1860) 8 H.L.C. 712, 717; *Hoole v. G. W. Ry.* (1868) 3 Ch.App. 262, 272, 277; *Howden v. Yorkshire Miners* [1903] 1 K.B. 308, 309; [1905] A.C. 256, 263. [It is said that a debenture holder cannot sue unless he has a security which is presently enforceable: *Halsbury's Laws of England* (3rd ed.) Vol. 6, p. 402, and cases cited; *sed quære* if he has voting rights which equate his position to that of a member: *Hutton v. W. Cork Ry. Co.* (1883) 23 Ch.D. 654.]

⁶⁷ See cases in last note and notes (68)–(70), *infra*. Rolt L.J. in *Hoole's* case, pp. 277–278, suggests that here a representative action can be most usefully used on behalf of a *class*, where there are competing interests; such an action would seem to be a “true” representative action: see (b) *below*.

⁶⁸ *Mutter v. E. & Mid. Ry. Co.* (1888) 38 Ch.D. 92, 104 (personal statutory right); *Hallows v. Fernie* (1868) 3 Ch.App. 467 (rescission for misrepresentation) and *Pulbrook v. Richmond Consolidated Mining* (1878) 9 Ch.D. at p. 613.

⁶⁹ Under R.S.C., Ord. 16, r. 9, on which see Prof. Lloyd (1949) 12 M.L.R. 409.

⁷⁰ *Mosely v. Koffyfontein Mines, Ltd.* [1911] 1 Ch. 73, 80–81; *Pender v. Lushington* (1877) 6 Ch.D. 70; and see *Foster v. Foster* [1916] 1 Ch. 532 (pleaded as both a personal and a representative action).

⁷¹ The normal rule under R.S.C., Ord. 16, r. 9, is that the plaintiff has complete control of his representative action, and it is curious that no provision seems, so far, to have been made to ensure that he uses this power for the benefit of the company on whose right he is suing. Such problems have been much litigated in the U.S.A. in respect of “derivative” actions, as they are there called: see Ballantine on *Corporations*, pp. 333 *et seq.*

⁷² *Burland v. Earle* [1902] A.C. 83.

the action does not give any clue to its real nature, for that characteristic is common to (b) and (c). It is, however, very important to discover when it is that the minority is waging a "corporate," rather than a shareholders', action, for four reasons. First, the representative "corporate" action is a special equitable invention, and it will not be granted to those who do not come with clean hands.⁷³ Secondly, the minority will here be permitted to sue in respect of wrongs committed and damage caused before they were members,⁷⁴ which ought not to be allowed in (a) or (b). Thirdly, the corporation must be joined as a party; if this is impossible, no corporate action can be waged.⁷⁵ Fourthly, money due or property belonging to the company can be recovered in this action; and, in order that this can be done, third parties from whom it is recoverable (e.g., directors, or outsiders who have profited so as to be accountable) may be joined as defendants.⁷⁶ Moreover, where the shareholder pursues a remedy for a wrong done to the company, he cannot join in the action any personal claim of his own.⁷⁷ These rules are common to Headings 1 and 4. On the other hand, Heading 4 is, as we shall see, concerned exclusively with "corporate" actions, so that this type of representative action is obligatory for a shareholder who claims to bring himself under that Heading, "fraud on the minority."⁷⁸ In claims relating to *ultra vires* acts, however, the plaintiff appears to have, in most cases, a free choice as to the form in which he sues, and many actions have been "personal"⁷⁹; but if, for any one of the reasons given, a plaintiff finds that his action brought to challenge an *ultra vires* act must be a "corporate" one, then all the other rules relating to corporate actions will apply. It has,

⁷³ *Towers v. African Tug Co.* [1904] 1 Ch. 558 (retention of "illegal" dividends); *Whitwam v. Watkin* (1898) 78 L.T. 188; and see *Gray v. Lewis* (1873) 8 Ch.App. p. 1055. A plaintiff at fault may still be allowed to restrain prospective illegalities: see *Moseley v. Koffyfontein Mines* [1911] 1 Ch. 73; affd. [1911] A.C. 409. See, too, *Gray v. Yellowknife Gold Mines, Ltd.* [1948] 1 D.L.R. 473.

⁷⁴ *Seaton v. Grant* (1867) 2 Ch. Ap. 459 (fraud on a minority); *Bloxam v. Metro Ry.* (1868) 3 Ch.App. 337 (*ultra vires*).

⁷⁵ *Ferguson v. Wallbridge* [1935] 3 D.L.R. 66 (P.C.) (company in liquidation; no action, even though "fraud on a minority"); *Clarkson v. Davies* [1923] A.C. 100. The company will not be bound unless joined as a party: *Bagshaw v. E. Union Ry.* (1849) 7 Hare 114, 131. But s. 333, Companies Act, 1948, should not be forgotten: (remedy by misfeasance summons during liquidation).

⁷⁶ *Salomons v. Laing* (1850) 12 Beav. 376; *Clinch v. Financial Corp'n.* (1868) 4 Ch.App. 117, 122; *Russell v. Wakefield Waterworks Co.* (1875) 20 Eq. 474, 481.

⁷⁷ *Stroud v. Lawson* [1898] 2 Q.B. 44; and he must not sue for two corporations at once on distinct wrongs done to each: *Smyth v. Muir* (1891) 19 R. 81.

⁷⁸ *Spokes v. Grosvenor Hotel Co.* [1897] 2 Q.B. 124.

⁷⁹ See cases cited above: and *Dumville v. Birkenhead, etc., Ry.* (1850) 12 Beav. 444; *Holmes v. Newcastle-upon-Tyne Abattoir Co.* (1875) 1 Ch.D. 682; *Tomkinson v. S. E. Ry.* (1837) 35 Ch.D. 675; cf. *Winch v. Birkenhead, etc., Ry.* (1852) 5 De G. & Sm. 562.

therefore, been convenient to set out the different types of minority action under the *Ultra Vires* Heading.⁸⁰

Heading 2. Special Majorities

In *Edwards v. Halliwell*⁸¹ Jenkins L.J. considered that anything which according to the articles ought to be done by special majority fell outside the rule; otherwise, "a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution, could assert that it alone was the proper plaintiff in any consequent action, and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. That exception exactly fits the present case." There a trade union had purported to increase subscriptions by ordinary majority of delegates when the rules demanded a two-thirds majority of the members.⁸²

Of the other cases said to produce the same rule in regard to companies, the critical decision is *Quin and Axtens, Ltd. v. Salmon*.⁸³ In this case, the Rule in *Foss v. Harbottle* was swept aside during the argument in the Court of Appeal,⁸⁴ was never raised again by any of the eminent judges or counsel who took part in the case, and was something, moreover, which might have assisted the losing party. By the articles of association of a registered company, the management of the business of the company was delegated to the directors⁸⁵; but Article 80 provided that no resolution of the directors upon a number of matters, including acquisition and letting of premises, should be valid unless notice had been given "to each of the managing directors" (A. and S.), and neither had dissented. S. had dissented from such a decision of the directors; but subsequently a simple majority of shareholders passed a resolution purporting to confirm that decision. It was held that S. had the right, in an action brought on behalf of himself and all other shareholders except the defendants, to obtain an injunction restraining the company and its directors from these acts which were inconsistent with the provisions of the articles.

⁸⁰ As for difficulties arising in the application of *ultra vires* to trade unions, see (1957) 20 M.L.R. 110 (n. 31); and for problems which would arise in respect of the Rule in *Foss v. Harbottle* if that doctrine were abolished as the Cohen Report of 1945 recommended, see (1946) 202 L.T. 225.

⁸¹ [1950] 2 All E.R. 1064, 1067.

⁸² Normally, no distinction is made in the trade union cases between directors and members: *Cotter v. N.U. Seamen* [1929] 2 Ch. 58.

⁸³ [1909] 1 Ch. 811; affd. [1909] A.C. 442, in a *trading company* case, *Reburn L.C.*, Lord MacNaghten, Lord James a

The judgments are concerned mainly with the principle, discussed above,⁸⁶ that shareholders cannot interfere with the exercise of functions delegated to directors; but they also establish that S. had the right to prevent this attempt to "alter the terms of the contract between the parties by a simple resolution instead of by a special resolution."⁸⁷ The contract referred to was the one which always arises from a company's articles of association, by virtue of section 20 of the Companies Act, 1948, and its predecessors. That section says, "*Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.*"

At first sight, the effect of this section appears to be a contract only between the members *inter se*.⁸⁸ Such a contract may, indeed, be one result of the section, "subject to this observation, that it may well be that the court would not enforce the covenant as between individual shareholders in most cases."⁸⁹ On the other hand, it is now abundantly clear that the articles constitute a contract between the company and each member, in his capacity as member. The law is clear "first that no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."⁹⁰ To be comprehensive, it is necessary to add that the articles can be treated as evidence of the terms of an informal contract made between company and "outsider"⁹¹; if that is the

⁸⁶ *Ante*, p. 201.

⁸⁷ Farwell, L.J. [1909] 1 Ch. 319.

⁸⁸ As was indeed the case in the partnership articles from which the modern system sprang.

⁸⁹ Farwell, L.J. [1909] 1 Ch. 318. Presumably because the obligations are owed to, and held against, the company, i.e., a by-product of *Foss v. Harbottle*. See on this problem *Walton v. Saffery* [1897] A.C. 299, 315 and other cases cited Buckley, *op. cit.*, p. 58.

⁹⁰ Astbury J. in *Hickman v. Kent or Romney Marsh Sheep Breeders' Assn.* [1915] 1 Ch. 881, 900, the *locus classicus*, where he reviews earlier cases. See, too, *Beattie v. Beattie* [1938] Ch. 708 (C.A.) (article providing for arbitration between members and company, not binding in a dispute between company and member in his capacity as director).

⁹¹ As stated above, it includes a member in any "capacity other than that of member." It is to be found in the cases cited in *Hickman*; and *Ry. Ltd.* [1925] 1 Ch. 500, 521; *Re T. N. P.* [1926] 1 Ch. 500.

case that contract will usually incorporate, along with the terms of the articles, the implied agreement inherent in the articles to the effect that changes in the terms can at any time be produced by special resolution changing the articles.⁹² That term as to alteration is also, of course, implied in the contract constituted by the articles—the “contract under section 20” defined by Astbury J. in the passage cited above. The contract under section 20 is, in other words, subject to section 10 of the Act.⁹³ But it is a binding contract, nevertheless, and in *Salmon’s* case, discussed above, it would appear that S. was doing no more than compel the company to observe that contract. It is a commonplace of company law that “a member can, by injunction, restrain the company from acting in contravention of its articles.”⁹⁴ If that is right, what has become of the Rule in *Foss v. Harbottle*, or, at any rate, of the “internal interference” rule? In *MacDougall v. Gardiner*, where a poll was refused at a meeting, and in many other cases, breaches of the articles occurred, but because the majority either could, or did, ratify them, no minority action lay. There is, in fact, a clash between the outmoded rule against internal interference and the simple principle that contracts are enforceable. This is further illustrated when the next Heading is investigated. Our discussion of the matter must continue there.

Heading 3. Personal Rights

“Personal rights” may be of two kinds, those which do, and those which do not, spring from the “contract under section 20,” i.e., from the articles of association.⁹⁵ Of those which do not, some are statutory.⁹⁶ Others arise from contracts which do not depend upon section 20 as explained above. Of these, the sort most commonly discussed in this context are contracts of service between directors and the company, a type of contract which frequently “incorporates” the articles as terms of agreement in the manner already described,⁹⁷ although it cannot arise out of the

⁹² “A contract made upon the terms of an alterable article”: Atkin L.J. in *Shuttleworth v. Cox Bros.* [1927] 2 K.B. 9, 26.

⁹³ A company “may by special resolution alter or add to its articles.”

⁹⁴ Charlesworth, *Company Law*, 6th ed. p. 28: citing *Wood v. Odessa Waterworks Co.* (1889) 42 Ch.D. 636, which was approved in *Salmon’s* case.

⁹⁵ In some cases there may be an overlap which makes it difficult to apply this distinction; see a recent example: *Wigram Settled Estates v. I.R.C.* [1957] 1 All E.R. 311, 318, 320.

⁹⁶ e.g., *Mutter v. E. & Mid. Ry.* (1888) 38 Ch.D. 92; *Nelson v. Anglo-American Co.* [1897] 1 Ch. 130 (shareholder’s right to inspect register).

⁹⁷ *Supra*, p. 208; for a good example see *Re T. N. Farrer, Ltd.* [1937] Ch. 352. It seems the better view that the company cannot be restrained from altering the articles even if this may lead it into liability for breach of contract: *Southern Foundries v. Shirlaw* [1940] A.C. 701, 740. *Contra: British Murac Syndicate v. Alpertou Rubber Co.* [1915] 2 Ch. 186.

articles themselves for the reasons given by Astbury J. In such a case, the director may acquire a "personal right" sufficient for him to prevent the company and its other managers from excluding him from the board,⁹⁸ provided he has a sufficient "proprietary interest" to call into play the equitable remedies⁹⁹; otherwise his remedy will be in damages.

Personal Rights derived from the Articles. Of greater interest here, however, are the personal rights arising from the contract under section 20—a "contract of the most sacred character" as it has been called.¹ In order properly to appreciate the problem which arises, it is necessary to indicate the extent to which the individual shareholder has been allowed by the courts to enforce such contractual rights against the company, particularly because in most of the relevant cases there is no breath of discussion concerning the Rule in *Foss v. Harbottle*. Usually cited are cases where the Rule was expressly held to have no application, such as *Edwards v. Halliwell*,² where the court said that each member had a personal right to prevent irregular alterations in rates of contribution to the trade union, and *Pender v. Lushington*,³ in which the right of a shareholder to vote according to the articles was enforced: "whether he votes with the majority or the minority, he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue." But the cases go much further than this, as the following illustrations show. They have recognised not merely the member's contractual rights in general terms under the articles,⁴ and the right to enforce his rights as member,⁵ but, in particular, personal rights, obtained from the articles, to transfer shares and to vote⁶; to protect preferential rights and class interests, such as the right to have shares offered to him⁷; to be

⁹⁸ *Pulbrook v. Richmond Consol. Mining Co.* (1878) 9 Ch.D. 610; *Le Cie de Mayville v. Whitley* [1896] 1 Ch. 788, 807; *Foster v. Greenwich Ferry* (1888) 5 T.L.R. 16. But the court has refused to force a director on an unwilling majority: *Harben v. Phillips* (1883) 23 Ch.D. 14.

⁹⁹ See *Hayes v. Bristol Plant Hire, Ltd.* [1957] 1 All E.R. 685, where in view of dicta (p. 688), the terms of the articles were presumably incorporated into the director's contract.

¹ *Clark v. Workman* [1920] 1 Ir.R. 107, 110.

² [1950] 2 All E.R. 1064: it is interesting to observe that in the judgments there one can find every "exception" except *ultra vires*.

³ *Jessel M.R.* (1877) 6 Ch.D. 70, 81.

⁴ e.g., *Borland's Trustee v. Steel Bros, Ltd.* [1901] 1 Ch. 279; *Bisgood v. Henderson's Transvaal Estates, Ltd.* [1908] 1 Ch. 743.

⁵ *Hickman's case (supra)*, p. 902; and see *Beattie v. Beattie* [1938] Ch. 708, 721-722.

⁶ *Pender v. Lushington (supra)*; *Moffatt v. Farquhar* (1877) 7 Ch.D. 591; *Marks v. Financial News* (1919) 35 T.L.R. 681; *Cannon v. Trask* (1875) 20 Eq. 669.

⁷ e.g., *Staples v. Eastman Photographic Co.* [1896] 2 Ch. 303; *Greenhalgh v. Arderne Cinemas* [1945] 2 All E.R. 719, [1946] 1 All E.R. 512; *James v. Buena Ventura, Ltd.* [1896] 1 Ch. 456.

registered and to enforce delivery of a share certificate in accordance with the articles⁸; to enforce a declared dividend as a legal debt,⁹ and if none is declared, at least to prevent dividends from being distributed otherwise than in accordance with the articles¹⁰; to prevent an irregular forfeiture;¹¹ to prevent directors holding office in breach of the articles,¹² and other "procedural" irregularities.¹³ Similarly, a member has a *personal* right to prevent alterations in the articles which would constitute a "fraud" on the minority¹⁴; and probably has a similar right to enforce proper notice of meetings and business to be conducted at them.¹⁵ It is true that cases of this character illustrate mainly rights to obtain a declaration or injunction; and it may be that a member cannot obtain a money judgment against his company, while he is a member, except in respect of a dividend which has become a debt due to him.¹⁶ In any case, the nature of the remedies available

⁸ *Moodie v. Shepherd (Bookbinders) Ltd.* [1949] 2 All E.R. 1044 H.L.; *Burdett v. Standard Exploration Co.* (1899) 16 T.L.R. 112.

⁹ See *Godfrey Phillips, Ltd. v. Investment Trust, Ltd.* [1953] Ch. 449, 457; *Wall v. London & Prov. Trust, Ltd.* [1920] 2 Ch. 582; *Foster v. Coles and Foster, Ltd.* (1906) 22 T.L.R. 555; *Ewing v. Israel and Oppenheimer, Ltd.* [1918] 1 Ch. 101.

¹⁰ See last note, and *Wood v. Odessa Waterworks* (1889) 42 Ch.D. 636; *Fawcett v. Laurie* (1860) 1 Dr. & Sm. 192; *Oakbank Oil Co. v. Crum* (1882) 8 App.Cas. 65. Some of the "dividend cases" involve both (i) enforcement of the contract in the articles, and (ii) the rule prohibiting dividends out of capital: e.g., *Mosely v. Koffyfontein Mines, Ltd.* [1911] 1 Ch. 73; [1911] A.C. 409.

¹¹ *Johnson v. Lyttle's Iron Agency* (1877) 5 Ch.D. 687; *Sweny v. Smith* (1869) 7 Eq. 324; *Goulton v. London Architectural Co.* (1877) W.N. 141 (a "procedural" irregularity).

¹² *Catesby v. Burnett* [1916] 2 Ch. 325.

¹³ See the injunction that was granted in *Spencer v. Kennedy* [1926] Ch. 125, 135. *Henderson v. Bank of Australasia* (1890) 45 Ch.D. 330; *Breay v. Browne* (1897) 41 S.J. 159, 160.

¹⁴ *Greenhalgh v. Arderne Cinemas* [1951] Ch. 286 (reviewing previous cases). The right to sue is *personal*, although, oddly enough, the only two successful actions were both representative: *Dafen Tinplate v. Llanelly Steel* [1920] 2 Ch. 124; *Brown v. British Abrasive Wheel* [1919] 1 Ch. 290. This phenomenon is explained *infra*. Distinguish "frauds" under Heading 4, *infra*.

¹⁵ *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503; *Tiessen v. Henderson* [1899] 1 Ch. 861; *Kaye v. Croydon Tramways* [1898] 1 Ch. 358, are curious cases if this is not the explanation. See, too, *G. W. Ry. v. Rushout* (1852) 5 De G. & Sm. 290; *Smith v. Duke of Manchester* (1883) 24 Ch.D. 611; and *Re Direct East & West Junction Ry.* (1855) 3 Eq.Rep. 479.

¹⁶ *Gower, op. cit.* 268, 359. *Quære* whether *Moffatt v. Farquhar* (1877) 7 Ch.D. 591 (versus company and directors) and *Murphy v. Synnott* [1925] N.I. 14 (versus other members), do not support the remedy of damages. Possibly the rule is that damages are never recoverable unless the plaintiff shows special damage to himself in his capacity as a member; if he cannot he must sue for an injunction, preferably in a representative action: see *Wright J. in Breay v. Browne* (1897) 41 S.J. 159, 160 (an action for damages in which the jury had awarded one farthing; on appeal, this was reversed. The plaintiff's right "was not a personal one but belonged to her as a member of the corporation. The plaintiff had suffered no personal damage. Her proper course was to bring an action in the name of herself and the other shareholders . . . for an injunction"). Those who wish to argue that damages can never be recovered by a plaintiff from a company of which he is still member will, of course, cite *Houldsworth v. City of Glasgow Bank* (1880) 5 App.Cas. 317, and *Re Addlestone Linoleum Co.* (1887) 37 Ch.D. 191.

does not affect the fact that these are all cases where the court did interfere to prevent irregularities, *intra vires* the company but in breach of the articles, at the instance of a member personally.

This line of argument is not weakened by the fact that many of these actions were in form representative actions. On the contrary, it is strengthened; for the plaintiff shareholders surely pursued their remedies as representative plaintiffs just because their fellow members, or a class of them, shared an interest in the matter.¹⁷ Thus in *Edwards v. Halliwell*,¹⁸ *Catesby v. Burnett*,¹⁹ *Wood v. Odessa Waterworks*,²⁰ *Pender v. Lushington*²¹ and the *Salmon* case, as in many others, a representative form was employed. Indeed, it is surely the key to *Salmon's* case that it *was* employed. It cannot have been the case in *Salmon* that the plaintiff was trying to protect his unique right to dissent from the directors' decision, a "right of veto . . . vested in the member by the articles alone."²² As member, he had no right of veto; the articles purported to give that right to him in his capacity as *managing director* and not as member. Article 80, indeed, clearly distinguished that capacity from his capacity as member.²³ *Salmon* sued as a shareholder to protect a right personal to him, but common to all the members. Hence the representative action. What was that right? It could not be a right vested in him *qua* managing director. In such a capacity (as an "outsider") he could not enforce the contract arising from the articles. It is, therefore, obvious that *Salmon* enforced the right of a member to have the articles observed by the company. What other right could members have? It is true that the proposition to which this conclusion gives rise apparently conflicts with the rule in *Hickman's* case that "outsider"-rights can never be enforced by reliance upon the articles.²⁴ The proposition is that a member can compel the company not to depart from the contract with him under the articles, even if that means indirectly the enforcement of "outsider"-rights vested either in third parties or

¹⁷ *Sweny v. Smith* (1869) 7 Eq. at p. 333. The practice plainly avoids multiplicity of actions.

¹⁸ [1950] 2 All E.R. 1064.

¹⁹ [1916] 2 Ch. 325.

²⁰ (1889) 42 Ch.D. 636.

²¹ (1877) 6 Ch.D. 70.

²² Gower, *op. cit.* p. 484.

²³ See the Article set out, [1909] 1 Ch. at p. 313. The relevant parts read: "No resolution of . . . the directors having for its object . . . (various matters including purchase and sale of premises) . . . or any matter affecting the rights of either of them, the said William Raymond Axtens and Joseph Salmon, as holders of ordinary shares of the company, shall be valid or binding unless . . . notice . . . shall have been given to each of the managing directors, the said William Raymond Axtens and Joseph Salmon, and neither of them shall have dissented . . ." (italics supplied).

²⁴ The second proposition of *Astbury J.* [1915] 1 Ch. 900; *supra*, p. 208.

himself, so long as, but only so long as, he sues *qua* member and not *qua* "outsider." This explanation of *Salmon's* case has not escaped later judges. Sir Wilfred Greene M.R., in *Beattie v. Beattie*,²⁵ decided that case on the ground that the director-member there had not put his case in this way; but he clearly recognised that such a formulation is possible. Such a right to *call upon the company to observe the articles* "is the right and the only right in this respect which is common to all the members, under this article," he said.²⁶ If this view is correct, the law surrounding *Hickman's* case is more complicated and more odd than has often been thought; but a line of authority, brooded over by *Salmon's* case, supports the view.²⁷

The conflict between Salmon's case and the Rule.—At every point, however, a general application of this view conflicts with the Rule in *Foss v. Harbottle* as understood in the cases discussed earlier in this article. It clashes with the view, so forcefully put by James L.J. in *MacDougall v. Gardiner*,²⁸ that the member does not have the right to complain of "irregularities" even if they contravene the articles. It derogates from the propositions made about majority ratifications of unauthorised directors' acts; such ratification is easily understood on ordinary agency principles where the directors purport to contract with outsiders as in *Grant v. U.K. Switchback Ry.*²⁹; but when, as in that case, the majority are allowed to validate not merely an absence of authority but also a breach of a procedure laid down by the articles, the clash with *Salmon's* case arises again. Similarly, we can easily be led to the view that each shareholder has a right of action to prevent the company from allowing persons to act as directors in contravention of the articles,³⁰ the argument expressly rejected in *Mozley v. Alston* itself³¹; and this, it is suggested, is the real cause of the

²⁵ [1938] Ch. 708, especially at p. 722. It is true that he saw "great difficulty" because of the Rule in *Foss v. Harbottle*, but he did not go further into the matter. See, too, *Woodlands, Ltd. v. Logan* [1948] N.Z.L.R. 230, 236.

²⁶ *Ibid.* 722: an article for arbitration of disputes between company and member; member was disputant in capacity of director.

²⁷ The only case known to the writer to contain any lengthy discussion of the consequences of it is *Australian Coal and Shale Employee's Fedn. v. Smith* (1937) 38 S.R.N.S.W. 48, Jordan C.J. It is true that earlier cases such as *Eley v. Positive Life Assurance Co.* (1876) 1 Ex.D. 20, 88, are against the proposition advanced. But they do not seem to involve plaintiffs putting their case in the way suggested; and in any case, even if they did, they could not stand with *Salmon's* case as interpreted above.

²⁸ (1875) 1 Ch.D. pp. 22-23; and see *Foster v. Foster* [1916] 1 Ch. 532.

²⁹ (1888) 40 Ch.D. 135.

³⁰ *Catesby v. Burnett* [1916] 2 Ch. 325 (no mention of *Foss v. Harbottle* by Eve J. or Gore Brown K.C. or Maugham K.C.).

³¹ See (1847) 1 Ph. 789, 796, 799. The "personal right" argument was expressly advanced. It might be argued that the internal statutory arrangements may not in that case have constituted a contract in the manner of the article under s. 20; but this would be a last-ditch distinction!

feeling of uneasiness which that case has caused to certain judges.³² Nor will it suffice merely to adopt the distinction made in *Boschoek Proprietary Ltd. v. Fuke*,³³ where Swinfen Eady J. suggested that the majority can ratify a breach of an article where the article in question amounts only to "a limitation of the authority of the directors" (as in *Grant's* case) "and not a limitation of the general powers of the company." The objections to such a formula are obvious; the phrase "general powers" evokes *ultra vires*, and that concerns not the articles but the objects in the memorandum; and in one sense their each and every departure from the provisions of the articles is a transgression beyond the "authority of the directors." This sort of approach, however, may set the scene for an answer to the problem. Attempts have been made to express it by saying that the majority cannot ratify what in substance is an *alteration* of the articles,³⁴ or what is a breach amounting to a "complete transformation of the company—a fundamental alteration of policy."³⁵ Again, it is plain that neither formula can provide much of a general guide, but both are suggestive.

The truth is that in each case a line has to be drawn through the articles. On one side stand clauses breach of which cannot be ratified; on the other stand those in the grip of the ordinary majority. There has, as yet, been little satisfactory assistance afforded by the case law as to the way of finding out on which side of the line a particular article will fall. It is, therefore, suggested that matters of "internal management" ought to be confined to matters already covered by judicial pronouncements. This, at best, will leave anomalies. Why should the right to vote be personally enforceable when the right to call for an effective poll is not?³⁶ But it will also follow *Salmon's* case in recognising that each member has a *prima facie* right to enforce by injunction and declaration "in aid of his legal right,"³⁷ every provision of the contract found in the articles; that he has not merely particular, personal rights under

³² e.g., Swinfen Eady L.J. in *Baillie's Case* [1915] 1 Ch. p. 518, where he reduces its importance as much as he can; and compare the doubts which beset Romer J. in *Cotter's Case* [1929] 2 Ch. p. 70, which have the same sort of cause.

³³ [1906] 1 Ch. 148, 163; a distinction adopted by Gower, *op. cit.* p. 484. Buckley, *op. cit.* pp. 168-169, deals with this problem oddly, by stating the Rule in *Foss v. Harbottle* in strict terms, and throwing in an acknowledgment to *Salmon's* case with "the minority may sue . . . *semble*, if a bare majority are purporting to do or authorize something inconsistent with the articles."

³⁴ Counsel in *Automatic Self-Cleansing Filter Syndicate v. Cunninghame* [1906] 2 Ch. p. 41; and see *Baillie's Case* (above); and the "special majority" cases such as *Edwards v. Halliwell* (*supra*).

³⁵ *Clark v. Workman* [1920] 1 Ir.R. p. 117. Compare *Re State of Wyoming Syndicate* [1901] 2 Ch. 431, 436.

³⁶ *Pender v. Lushington* (*supra*) and *MacDougall v. Gardiner* (*supra*).

³⁷ *Wynn-Parry v. Jackson Phillips, Ltd. v. Investment Trust, Ltd.* [1953] Ch. p. . . .

that contract, but the personal right to see that that contract is observed—subject only to those matters of “internal management” on which the courts have seen fit to displace his contractual rights in favour of majority rule. If that approach is justifiable, then English company law has at last broken free from the shackles of the “internal management” rule which the old law of partnership bequeathed to it. The argument does not, of course, affect the other limb of the Rule which requires “action by the company to remedy wrongs done to it,” to which we must now turn; but it does mean that the mere fact that a breach of the articles can be expressed to be an “internal irregularity” is not a reason, without more, for saying that the wrong has been “done to the corporation” alone and for denying to the individual member a personal right of action in respect of the wrong. The question which the court should ask itself is: “Was this an irregularity such that we will allow an ordinary majority to put it right?” There is still room for a *new* formula to mould the answers to be given to that question; but the approach suggested would, at any rate, help to link the two lines of cases which stand, so far, in glaring contrast at the centre of modern company law. It is after all only a return to ancient principle to ask as “*the first question . . . whether the general body of shareholders could not sanction such an act. If they could a single shareholder cannot object . . . This was the principle of Foss v. Harbottle.*”³⁸

(To be concluded)

³⁸ Page Wood V.-C., *Taunton v. Royal Insurance Co.* (1864) 2 H. & M. 135, 140 (*italics supplied*).

JURISPRUDENCE AND THE DISCUSSION OF OWNERSHIP

G. P. WILSON

"THE problem of ownership remains but it is not a legal problem; it is the concern of . . . any and every specialist who can contribute his grain to the common heap . . . The lawyer naturally has his contribution to make, but as the problem is not fundamentally a legal problem the final solution does not lie with him. He is concerned with ownership only so far as it produces consequences within the sphere of his own special technique."¹ This article is written to suggest that ownership as a topic of jurisprudence is best regarded not as an isolated concept but as a jurisprudential contribution to the wider problem of the use of things; and that it is an appropriate subject for general jurisprudence since it raises questions which are faced by all legal systems that preserve the notion of private property.

I

For Austin, writing in 1832, ownership was not a problem; it was a kind of right. "Of the principles, notions and distinctions which are the subjects of general jurisprudence," he writes, "some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community) without conceiving them as constituent parts of it."² One of these necessary notions was that of a right. One of the necessary distinctions was that between rights which availed again the world at large, rights *in rem*, and rights which availed against persons specifically determined, rights *in personam*. Of rights *in rem* some were over or in respect of things (in the sense of permanent external objects),³ others over or in respect of persons. Rights *in rem* which existed with respect to things could be distinguished in several ways, but the most important were the distinctions based on "differences between the degrees wherein the entitled persons may use or deal with the subjects" of their rights⁴; and here the leading distinction was between rights of ownership property or dominion, on the one

¹ Professor Hargreaves (1956) 19 M.L.R. 17.

² Austin's *Jurisprudence*, 5th ed., Vol. II, "On the Study of Jurisprudence," p. 1073.

³ Lecture XLVII, p. 789.

⁴ Lecture XLVIII, Vol. II, p. 793.

hand, and what Austin calls "servitudes" on the other. A right was a right of "ownership" if it gave the person entitled to it an *indefinite* power of using and disposing of the subject of the right. It was classed by Austin as a "servitude" if it merely gave a *limited* power of use and disposal, which was capable of exact circumscription or definition.⁵ This distinction was quite independent of the probable duration of the right in question, of how long it might last, though rights *in rem* in respect of things could also be distinguished in this way⁶ (and Austin recognised that the probable duration of a right would usually affect the scope of the powers attached to a particular class of right). Thus for Austin not only the right of the tenant in fee simple but also the rights of tenants for life or tenants for terms of years were "property" rights. So, too, were the so-called "personal servitudes" of Roman law, usufruct, usus, habitatio, as well as emphyteusis and superficies. For though they could be regarded as subtractions from an even wider power of user or exclusion residing in another person (the dominus), nevertheless they were not servitudes "properly so called" because they were not *definite*, but *indefinite* subtractions, indefinite in the sense that "in all these cases the party entitled . . . has an *indefinite* power or liberty of using or dealing with the object."⁷ Of course Austin recognised that not all property rights gave the same powers of use and disposal. The powers bestowed by all were restricted, and some were more restricted than others. Property rights, in Austin's phrase, were capable of an infinite number of "modes," and though the "modes" were not capable of exact circumscription, they were distinguishable from one another by precise lines of demarcation. Though distinguishable, however, they all had one characteristic in common, that the powers they bestowed were indefinite.⁸

"Too much of English writing on jurisprudence consists of a desperate attempt to apply the concepts of Roman or continental law to the rules of English law," writes Professor Campbell.⁹ One of the most significant features of Austin's leading distinction is that he avoids this temptation (even though he heads his Lecture XLVIII *Dominium and Servitus*). Despite his profound respect for the genius of the classical Roman lawyers and the modern German interpreters of the Civil Law such as Savigny and Thibaut,¹⁰ he

⁵ p. 794.

⁶ This Austin does in Lecture LI.

⁷ Lecture XLVIII, p. 795, L, pp. 823-824, LII, p. 851.

⁸ XLVIII, p. 799.

⁹ 7 C.L.J. 215.

¹⁰ See e.g., Vol. I, p. 53 on Savigny's *Recht des Besitzes*, p. 72 on Thibaut's *System des Pandekten-Rechts*; though he is not uncritical of e.g., Savigny's proposals for codification Vol. II, p. 669 and Thibaut's discussion of status, p. 707. See also the note by Sarah Austin at p. 1038. As to his attitude to Roman law see e.g., p. 1080.

formulates his leading distinction in such a way as to cut across the traditional formulations of Roman as well as English lawyers; so as to include both the "personal servitudes" and the term of years as "modes" of property—and this in a sphere where a nodding acquaintance with Roman law has done more to bedevil Analytical Jurisprudence than in any other, the sphere of "dominium" and "possessio." It is true that in discussing the various "modes" of property he says that, "though the possible modes are infinite, and though the indefinite power of user is always restricted more or less, there is in every system of law some one mode of property in which the restrictions to the power of user are fewer than in others . . . in which the power or liberty of indefinite use is more extensive than in others"; and that "to this mode of property the term dominion, property, or ownership is pre-eminently applied."¹¹ It is true, too, that he identifies this with the "dominium" of Roman law ("dominium," he adds, "in the strict sense"), and the fee simple in land (with some reservations) and absolute property in a movable, in English law.¹² But this "absolute property," as he calls it, is still but a "mode" of property. It is still one of many "modes," and his leading distinction remains that which turns on the definiteness and indefiniteness of the power of user, and he still discusses the rights which fall on both sides of the line, paying as much attention to the "servitudes" as to the "modes" of property. He was not, as he might well have been, led off on a happy hunt for "dominium" in English law, which sometimes takes the place of jurisprudential discussion of ownership.

A second point that should be noted is his acute comment on the treatment of "dominium," ownership in its strict or absolute sense as exemplified in the Roman law. "In the Institutes of Gaius and Justinian," he says, "the right of property or dominion is not defined at all. Things are described; the modes of acquiring property in them are described; servitudes are described; but of the right of property no direct description is given." And this accords with Austin's own view that only the restrictions or limitations on an owner's powers can be clearly defined so that "the definition of the rights of property lies throughout the *corpus juris* and imports a definition of every right or duty which the *corpus juris* contains."¹³ The French and German Codes and Mr. Turner take a similar view on this point.¹⁴

¹¹ XLVIII, p. 796.

¹² *Ibid.*, p. 797.

¹³ *Ibid.*, p. 799.

¹⁴ See below.

II

Ownership came into Austin's lectures as part of a distinction: a distinction which he deemed "necessary." His course of lectures was a course on General Jurisprudence and by General Jurisprudence he meant "the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law; understanding by systems of law the ampler and maturer systems which by reason of their amplitude and maturity are pre-eminently pregnant with instruction," though he admits that these principles and distinctions could not be said to be conceived with equal exactness and adequacy in every particular legal system, and that, even where they were, they were likely to be complicated with the system's individual peculiarities and expressed in a technical language peculiar to itself.¹⁵ The distinction between rights of ownership and other rights *in rem* he regarded not only as common to all legal systems but necessary; but can the necessity of a concept of ownership justify its inclusion in a book on general jurisprudence today? Mr. King, it seems, would think not. He proposes to include in his comprehensive definition of law the notions of "court, judicial thought, legal norms, sources of legal norms (which will include judicial concepts of law), legal thought, and rules of law of three distinct types (substantive, procedural, and the rules of judicial process). Further analysis of these rules will yield duties, liberties, powers and any correlative notions: persons, things, titles and sanctions," but not ownership. By including any element in his definition of a legal system he at once makes it "necessary" in Austin's sense since henceforth, by definition, we cannot imagine a legal system without conceiving it as a constituent part of it. Mr. King in fact goes further. "These elements," he says, "constitute at least the initial *if not the complete* field of general jurisprudence." They are common to all legal systems by definition (albeit a definition constructed with an eye on the phenomena of legal life). Any other general elements can only be discovered by empirical examination and the comparison of actual systems. "And it may be doubted whether there are in fact any such further elements to be discovered." It is true, he says, that different systems of law may contain elements which are similar in a general way, as the English notions of contract and ownership are generally similar to the Roman notions of "contractus" and "dominium." "But this general similarity does not constitute these notions topics of General Jurisprudence, save as illustrations of specialised . . . forms of the

¹⁵ pp. 1072-1074.

truly general notion of a right or collection of rights.”¹⁶ Here we are almost back to Austin, though with a different conclusion. General Jurisprudence is the study of what is general, in the sense of common to all legal systems. There is no notion of ownership common to all legal systems. Therefore ownership is not a topic for General Jurisprudence, except as an aspect of rights.

Ownership, it seems, is to suffer the same fate in the hands of Mr. King as corporate personality at the hands of Hohfeld.¹⁷ It is to be dissolved into its constituent elements, the elements, that is, which it has in common with all other legal conceptions, not so much to see what are the peculiar characteristics of that bundle of rights to which the word ownership is often applied, but rather as a further illustration as to how basic the “fundamental conceptions” really are. Mr. King’s attitude towards ownership derives largely from his view as to the nature (or definition) of General Jurisprudence. For him the appropriate subject-matter for General Jurisprudence consists in those notions and elements which can be regarded as common to legal systems, either by definition, or observation. And though the problems of ownership may be the same for all legal systems he seems to think that the solutions differ so widely as to make it impossible to frame a concept which would be applicable to all of them—or rather, perhaps, that such a concept would have to be so abstract in order to cater for the differences of treatment in different systems as to be devoid of any real significance. But is it in fact necessary to say that the only topics for general jurisprudence are concepts which can be shown to be common to all legal systems? Is one in fact faced with the choice of either studying particular legal systems in comparative isolation from one another (so-called Particular Jurisprudence) or, on the other hand, confining one’s attentions to those concepts which can be regarded as truly general?

III

Mr. Dias and Mr. Hughes seem to have avoided this question in their treatment of ownership. Sometimes it sounds as if they are discussing a concept of English law, at other times as if they are discussing a topic of far wider significance. Thus, on the one hand, the first point in their “Analysis” is that “ownership in English law can only vest in a ‘person,’ ”¹⁸ and ownership is included as a topic for discussion as a “notion” which a lawyer is called upon

¹⁶ 11 C.L.J. 234–235.

¹⁷ Hohfeld, *Fundamental Legal Conceptions*, pp. 198–200, and see Professor Hart’s criticism, (1954) 70 L.Q.R. 54–55.

¹⁸ Dias and Hughes, *Jurisprudence*, p. 339. An extremely cautious proposition.

to handle in the daily exercise of his profession,¹⁹ which seems to suggest a concept which is a constituent part of a particular legal system, though the authors do open their chapter on ownership (Chapter 12) with the apology that "it is one of the peculiarities of English law that it has never had to work out a concept of ownership as Roman law for instance elaborated dominium."²⁰

On the other hand the authors say that ownership only arises in such ways as are specified by each legal system; that the extent of the rights, etc., that are exercisable by an owner reflects the social policy of the particular legal system; that ownership is a source of social power,²¹ and that it is not needed on a desert island²²—all of which are very general points. As a result the authors' treatment could equally well be regarded as a broad-minded treatment of a concept to be found in the English legal system or as a rather unsystematic treatment on a deliberately more general level, with particular reference to English law—unsystematic, because the discussion lacks unity, and the points made are of such unequal significance. Whichever view we take leaves

¹⁹ *Ibid.*, p. 7.

²⁰ *Ibid.*, p. 336. One ought perhaps to take issue with Mr. Dias over the deceptive simplicity of this way of describing the Roman treatment of dominium since to a great extent the Roman lawyers did not "elaborate" dominium but talked of it as something given. The texts on dominium, for example in D.41.1, deal primarily with the ways in which dominium is acquired as its title "de acquirendo rerum dominio" would lead one to expect (the same is true to a great extent of the texts dealing with possession). Only in a very wide sense of dominium can Roman lawyers be said to have been elaborating dominium when they were in fact developing such analogous institutions as usufruct or emphyteusis—a sense to be found in the West Roman Vulgar Law (Levy, *West Roman Vulgar Law*, Law of Property, p. 67) but not in the law of classical Rome—or do the authors intend to refer to a gradual differentiation of powers exercised by the early head of the household into such elements as dominium and patria potestas? It seems unlikely. Professor Rheinstein in his edition of Weber's *Law and Economy in Society* uses almost the same phrase: p. 221, n. 77. (On the same page Weber gives a warning which is complementary to that of Professor Campbell cited above, n. 9, "the abstract character of many legal concepts which today are regarded as being particularly Roman in their origin is not to be found originally in Antiquity. The much discussed Roman concept of dominium, for example, is a product of the denationalisation of Roman law and its transformation into world law"—complementary to Professor Campbell since especially in the sphere of ownership and possession classical Roman law concepts have been blown up into jurisprudential concepts while retaining their classical Roman names before the attempt has been made to fit the phenomena of modern legal systems into them.) A footnote is no place to go further. The point that one ought to make is that if talk of the elaboration of dominium is to be justified discussion may range from the origin of the Indo-European Peoples as in Noyes, *Institution of Property*, to nineteenth-century Pandectist literature paving the way for a German Civil Code.

²¹ *Ibid.*, pp. 342, 344.

²² p. 341. Even if this is true it would seem as much due to the absence of a legal system, law, and books on jurisprudence, as on the absence of a possible defendant as the authors' statement seems to imply.

open the question whether a more systematic discussion on a more general level is possible.

IV

One important contribution Dias and Hughes do make. A discussion of ownership is included in their book because they regard it as a topic of general interest to lawyers and not on the grounds of any supposed or observed necessity. It is there because it is useful to have it there. When Austin included a discussion of ownership in his lectures he did so on the grounds of necessity, and the way in which he thought it was necessary determined the scope of his discussion. It was included as one side of a distinction between rights, and it was discussed as one side of a distinction between rights. And the same will be true of a discussion which is included on the grounds of utility and interest. The same sense of utility that justifies its inclusion will determine its scope and inspire its content. What, then, is the most useful way of talking about ownership once it has been included as a topic of general interest?

V

“Ownership, in its most comprehensive signification” says Salmond (and his definition is preserved by the learned editor in the latest edition) “denotes the relation between a person and any right that is vested in him.”²⁴ Now it is true a case might be made out for saying that “the subject-matter of ownership in its wide sense is in all cases a right” or, at least, a bundle of rights. When I assert that I own Blackacre I am assuming that there is in the particular legal system to which I am silently referring a recognisable bundle of rights, liberties, powers and immunities, which can be marked off from other rights, etc., which are available as regards Blackacre, and which can be called “ownership” of Blackacre in that system (what the American Restatement calls “complete property”²⁵—the largest bundle that any one person can have at any one time as regards any one thing, according to the rules of the particular legal system). I am further alleging that I have fulfilled the conditions laid down by that system for the acquisition of title to that bundle and that nothing has happened since to transfer my title to anyone else (though I may have parted with some of the rights, etc., which go to make up the bundle to the extent that the bundle includes powers to make such dispositions without parting with the title to the bundle as a

²⁴ Salmond, *Jurisprudence*, 11th ed. by Dr. Glanville Williams, p. 300.

²⁵ American Restatement, Property, Introd., p. 11.

whole). This bundle is mine. I own the bundle. And the same may be said not only as regards ownership of Blackacre and other material objects but also as regards immaterial "things" such as copyrights and shares, etc. When I say that I own a share or some other notional thing I am making a similar mixture of assumptions and assertions—that there exists a recognisable Hohfeldean bundle of rights, liberties, powers and immunities similar to those which exist as regards material objects, which can be called "ownership" of the share, etc., in the particular legal system, and that I have fulfilled the conditions laid down for the acquisition of title to it. Here, too, I am alleging my title to the bundle. The bundle is mine. I own the bundle. So it could be said, without any great strain of language that, whether the ultimate "thing" about which the allegation is made is a material object like Blackacre, or an immaterial "object" like a share, what I "own," in the sense of assert title to, is in all cases a right, or a bundle of rights. And it may be useful at times to talk in this way since, by doing so, one can emphasise that it is not the nature of the "thing" but the existence and content of the bundle that is important from a jurisprudential point of view, since it is this that determines whether or not the word "ownership" is to be used to describe the relations which may exist in a legal system between a person and a particular class of "things." By talking in this way it is also possible to suggest that there is no theoretical difficulty in the way of making notions and institutions normally associated with material things available for use with regard to any other assets which a legal system is prepared to regard as "things" capable of ownership. To go further, however, and say that because what we own is in all cases a right, or even a bundle of rights, then ownership, even in its most comprehensive signification, is the relationship between a man and *any* right that is vested in him, is to rob us of this insight, and indeed is to rob the word "ownership" of any significance at all. Salmond himself, in fact, goes on to talk of ownership in a narrower sense as "the right to the entirety of the lawful uses of a corporeal thing,"²⁶ a definition in keeping with the traditional formulations of the French and German Civil Codes, and a far more convenient starting point for a jurisprudential discussion of ownership.

VI

"La propriété est le droit de jouir et disposer des choses de la manière la plus absolue pourvu qu'on n'en fasse pas un usage prohibé

²⁶ Salmond, p. 302.

par les lois ou par les règlements.”²⁷ This, in accordance, says Professor Vinding Kruse,²⁸ with the political and legal philosophy of its day, emphasises ownership as liberty—freedom to do anything that is not forbidden by the law. The German Code includes a similar formulation, though it also emphasises the rights of third parties as further possible restrictions on an owner’s powers to do what he will with his own, and also includes the owner’s powers to exclude others from enjoyment as an essential characteristic of his right.²⁹ Both of these provisions accord with Austin’s view of ownership as an essentially indefinite power over a corporeal thing. Both share his view that the particular content of ownership in any given system is to be found by examining the restrictions imposed on an owner’s power. The role of the legal system is seen as negative and restraining and positive only to the extent that it offers an owner remedies for the protection of his right. Mr. Turner takes the same view. For him “the law of ownership is not a set of rules fixing what I may or may not do to a thing, but a set of rules fixing what other people may or may not prevent me from doing and what I may or may not prevent them from doing to the thing.”³⁰ This approach, besides emphasising what may be called the negative or regulating aspect of the legal system in its treatment of ownership, also accords well with the Anglo-Saxon and Anglo-American legal habit of dissolving legal problems and institutions into talk about forms of action, which has its jurisprudential equivalent in the emphasis on rights and duties as the basic stuff of which law is made up, and the emphasis on relations between people as being the only significant legal relations. But is the role of the legal system best seen as a negative today? Much has happened since the French Code was first published and since Austin was delivering his lectures, and the law has come to play a far greater positive role in the activities of modern society. Are people still to be regarded as the best focal point for a discussion of ownership, or ought we not perhaps to emphasise the rather old-fashioned view that the problems which arise in discussions of ownership are, when all is said and done, problems about the use of *things*?^{30a}

²⁷ Article 544, Code Civil.

²⁸ Vinding Kruse, *Right of Property*, p. 7.

²⁹ German Civil Code, § 903. “Der Eigentümer einer Sache kann, so weit nicht das Gesetz oder Rechte dritter entgegenstehen, mit der Sache nach Belieben verfahren, und andere von jeder Einwirkung ausschliessen.”

³⁰ 19 *Canadian Bar Review*, p. 343.

^{30a} Since writing, I find Professor Lawson raises the same question in 32 N.Y. Law Review, p. 912.

VII³¹

It is the internal power of disposal that we normally think of, the power physically to use and exploit a thing, when we talk of ownership as being an indefinite power and liberty of user; indefinite, because it is impossible to list the infinite number of ways in which one can deal with things physically. And it is as regards this power and liberty that the role of the legal system may chiefly be seen as the limited one of preventing the use of property to the detriment of society and other people, and protecting a person's enjoyment of what is his own. Even more important, however, from a functional point of view, at least in a modern complex industrial and commercial society, than the physical powers of enjoyment are what might be called the "external" or "legal" powers of disposal which are available, the powers to pledge, lease, mortgage, create and acquire easements, leave by will, etc.; "external" because the exercise of these powers is intimately connected with an owner's positive relations with other people, people with whom he may have contractual relations, his creditors, and heirs; "legal," because these are powers of use and disposal made available by legal systems and protected by them, institutions embodied in the legal system which make a more productive and convenient use of a person's assets possible, and, indeed, which in many cases make them assets, in the sense of making them capable of more advantageous use than would be possible without the support of the legal system. This, it is suggested, the contribution that they make to the productive use of the assets in the community, is the most significant aspect of the contents of the bundle to which the name ownership may be given (the American Restatement's "complete" and Austin's "absolute" property). And the bundle is only the starting point; for "the varied purposes of economic life require not only forms in which the right of property may function to its full extent with all its powers at the same time in relation to the same good, but also forms in which the powers are divided."³² So, though the bundle may be regarded as a starting point, it is only a starting point. It is a convenient starting point, first, because most legal systems provide means by which all the rights, liberties, powers, etc., which are available as regards any particular thing are capable of being acquired by one person even though they are not normally enjoyed by any one person at the same time; which makes

³¹ How much of what follows is derived from Vinding Kruse's *Right of Property* I can no longer tell. The stimulation is undeniable.

³² Vinding Kruse, p. 220.

the bundle fairly easy to identify^{32a}; and secondly, because this bundle usually contains the powers by which the other property interests of narrower scope or shorter duration than that designated by "complete" property are created. But though it is a convenient starting point it ought not to be regarded as the be and end all of a jurisprudential discussion of ownership. For though the more limited interests can be regarded as fractions of or subtractions from the "complete" property, when one considers them from the point of view of their contribution to the productive use of assets in a community they play an independent role. That is why it is misleading to discuss them as "mere" encumbrances since "mere" can too easily be taken in a pejorative sense. That is why, too, the search for ownership and the owner par excellence should be regarded only as first steps and not as the ultimate goal of jurisprudential discussion. That is why one regrets the separation of the discussion of "Ownership" from that of "the Law of Property" in Salmond's book,³³ since the separation obscures the fact that the principal concern of both is "the entirety of lawful uses of a (corporeal) thing."

VIII

Using the bundle as a starting point, a legal system may be considered from three points of view. First, how far can an owner make productive use of his ownership other than by direct physical exploitation; to what extent is the ownership bundle capable of division; to what extent can he deprive himself of some of his powers while retaining others; how varied are the interests and rights he can create by virtue of his ownership. Approached from this point of view, the way is open for a comparison of the extent to which different legal systems are prepared to support an owner in the productive use of the thing he owns, as well as the convenience and quality of the techniques made available; and not only a comparison of different legal systems but also of the same legal system at different times.³⁴ One thinks, for example, of the methods of giving security in Roman law, ranging from the cumbersome

^{32a} Cf. Markby, *Elements of Law*, 6th ed., 1905, p. 158. "I do not think it is possible to explain what is meant by ownership except by starting with this abstract conception of it. It is to this that we always revert when we are trying to form a conception of ownership."

³³ Salmond, Chaps. 12 and 20. Contrast Lawson, *Rational Strength of English Law*, pp. 75 *et seq.*

³⁴ In much the same way as, taking group conduct as one's point of reference instead of taking corporate personality as the starting point, one might emphasise the importance of the establishment in the English legal system of the nineteenth century of a straightforward method of acquiring the privileges of incorporation, and later, of limited liability. Cf. Cooke, *Corporation Trust and Company*, p. 7.

fiducia with its transfer of dominium, through pignus, still involving transfer of possession, to hypotheca involving no transfer at all; or the relative flexibility³⁵ enjoyed by the English legal system through the early development of the notion of estates in land and the trust concept.^{35a}

Secondly, in what way does the legal system regard the interests thus created; in particular what powers of internal and external disposal does it bestow on those in whom they are vested, not only as regards the original thing owned but as regards the limited interest created. The bundle enjoyed by the holder of a limited interest will be smaller than the complete property bundle as regards the original thing, but the legal system may be prepared to treat him as complete owner of his own limited interest, and bestow upon him wide powers of disposal over it similar to those enjoyed by the original owner with respect to the original thing. If this is so, the contents of his two bundles provide new starting points for investigation on the same lines as that proposed for the original owner's complete property bundle, again with especial emphasis on the external powers of disposal enjoyed and the new interests and rights which can be created.³⁶

The treatment of these fractional interests, fractional in the sense that they may be regarded as parts of someone else's complete property, leads on to a third aspect, already hinted at in the discussion of Salmond's comprehensive definition, namely, the "things" over which the powers, etc., which go to make up the normal content of complete property as regards a material object can be exercised. Professor Vinding Kruse expresses very strongly the view that the number of "things" to which these powers can apply, albeit with modifications, is capable of indefinite expansion so as to cover any good, whether tangible or not, which a legal system is prepared to regard as a "thing" capable of ownership, *i.e.*, whether it is a material object like Blackacre, or an immaterial object, such as a fractional interest, or an interest which may be regarded as a "thing" in its own right, such as a share or a copyright. This leaves the way open for an examination of the flexibility of the legal system from the point of view of the extent

³⁵ Flexibility here refers to the techniques available rather than to the use to which they were put, just as productive use is regarded primarily from the point of view of the owner for the time being, rather than of either his successors or the community. Thus, many of the varied legal techniques which one might cite as examples of the flexibility of the English law of real property were in fact developed by astute conveyancers to make it possible for aristocratic patriarchs to tie land down rather than to make it more readily available as a productive asset.

^{35a} Cf. Vera Bolgár, "Why no Trusts in the Civil Law?" 2 *Am.J. Comparative Law*, p. 204.

³⁶ Cf. Vinding Kruse, pp. 112 *et seq.*

to which it is prepared to recognise the application of the contents of the ownership bundle, normally associated with material things, to other, intangible, assets. Such an application rests on the assumption that the economic function of an asset is independent of its being a tangible or intangible thing, and on the recognition of both tangible and intangible things as assets to which the same powers of enjoyment and disposal are appropriate.³⁷

An increased emphasis on the positive, external powers of disposal does not of course mean that the traditional aspects should be disregarded. The extent of the liberties left to an owner is undeniably important, especially when the encroachments upon his freedom of action have come so near to challenging the very existence of private property. What is said here, in fact, rests on the assumption that there are still wide areas in most legal systems where it is possible and profitable to talk of ownership as a recognisable bundle and to use the notions of the owner and his bundle as starting points for a wider discussion; though it is an assumption which should not go unchallenged. Mention should therefore be made of the nature of the restrictions imposed upon the use of things and the remedies given to protect the use and enjoyment of things owned, just as mention should also be made of the nature of the conditions laid down for the acquisition of title to the powers, etc., which go to make up the ownership bundles in any legal system. All these aspects, however, like those mentioned earlier, are subordinate to the main theme which concerns the use of "things" and in particular the facilities and protections provided by legal systems for the widest and most productive use and enjoyment of assets. All the aspects mentioned are a suggested framework which would make it possible to analyse fruitfully the contents of a legal system from this point of view, and also make possible the comparison of different legal systems or of the same legal system at different times. It is not suggested that an elementary textbook on jurisprudence should in fact attempt a detailed comparison, but that this wider aspect should always be borne in mind in any jurisprudential discussion of the problem. Nor is a sociological investigation proposed, for it is not suggested here that an attempt should be made to find out the actual role of the legal system in society, though at various points this might incidentally be revealed, but its potential role, the facilities it

³⁷ Cf. Vinding Kruse, pp. 121-123, Lawson, 32 N.Y. Law Review, p. 918, and Markby, *op. cit.*, p. 161. "In the view of some jurists . . . it is wrong to speak of ownership of anything which is not a material object . . . It seems to me a strange thing to speak of a thing as erroneous which is universally done and especially when after all the question is only one of convenience—how shall we shape the conception of ownership?"

offers if they are needed. Such an approach does, however, emphasise the social context of the law of ownership in treating it as part of the wider problem of the productive use of assets. This, it is suggested, is the point of view from which it is most fruitfully to be regarded, and it is a consideration of the problem from this point of view that provides the lawyer's most useful contribution to the larger problem of ownership in society.

X

One thing should be added about the nature of such suggestions as these. They are not meant to imply that there is only one proper analysis of ownership—that all other analyses are wrong and that this is right. The search is always for the more fruitful, the discussion that will throw most light over the things in which we are most interested. What I have tried to suggest is that even though ownership is not regarded as a necessary or even a general concept, in the sense that it is common to all legal systems, there is, nevertheless, still room for a discussion in the light of the problems which the law of ownership is devised to deal with, in terms general enough to be applicable to wide areas of most legal systems without being so abstract as to be without significance. Here and there I have bordered on the controversy as to the scope of General Jurisprudence, but I have taken the problem of ownership as a particular example since I believe that the controversy about the scope of jurisprudence is best conducted in concrete terms. One criterion I have implicitly suggested. It should always be possible to ask about anything that appears in a book or course on jurisprudence, why it is there, and why in that form, and expect a convincing answer.

BOOK REVIEWS

A History of English Criminal Law and Its Administration from 1750. Vol. 2. The Enforcement of the Law: xvii, 631 and (index) 119 pp. Vol. 3. The Reform of the Police: xvii, 637 and (index) 49 pp. By LEON RADZINOWICZ, LL.D.(Cantab.), LL.D.(Cracow), LL.D.(Rome). Published under the auspices of the Pilgrim Trust. [London: Stevens & Sons, Ltd. 1956. £4 4s. each volume.]

THE first volume of the *History of English Criminal Law* was reviewed by me at some length in this *Journal* in 1949, when the general plan and method adopted by the author was described, so that the second and third volumes can be treated briefly.

The outstanding feature which emerges from the second volume is the domination of *laissez-faire* in the attitude of the State towards crime in the eighteenth century and the early part of the nineteenth. It was the duty of the State, when it was considered necessary, to create or define crimes by legislation, to provide magistrates and judges to try accused persons, and to prescribe and carry out a variety of punishments. But during the eighteenth century any recognition by the State of a duty to prevent crime, to detect crime, to apprehend suspected persons and even to prosecute them was sketchy and haphazard. Accordingly, the public were very much dependent upon private initiative for the discharge of these essential functions. This initiative was fostered in many ways, for instance, by offering pardons to accomplices who would "peach" upon their friends; by offering statutory rewards for persons who secured convictions or compensation for those who were injured in the course of this process; by public advertisements of rewards and "no questions asked"; by combinations of insurance companies, traders and Societies for the Prosecution of Felons; or by means of common informers.

The sub-title of the third volume is the Reform of the Police. The word "police" was a novelty in the middle of the eighteenth century. Dr. Johnson's Dictionary emphasised its French origin, which helped to make both the word and the thing unpopular in England. The word had a sinister meaning such as OGPU or SS. The English public for a time preferred to run the risk of violent attacks by robbers than to expose their liberties to any risk of curtailment. This volume contains a careful study of the efforts of Henry Fielding and John Fielding, by their writings, their administrative initiative, their fervour for reform and their ability as magistrates, to cure the public of their opposition to organised

police. There is an interesting chapter on the Gordon Riots which had some effect in destroying the complacency of the City of London. Another chapter is devoted to a prominent reformer—Patrick Colquhoun (1745–1820) whose impact upon the development of the police force and upon its administration is not as well known as it ought to be. The challenge given by the Utilitarians—particularly Jeremy Bentham—to the orthodox complacency is well described, and the volume ends with a chapter entitled (Edwin) “Chadwick’s Projection of a Preventive Police.” The more one reads of the social history of the nineteenth century the more the figure of this great social reformer and investigator stands out. His work in regard to the police, the new poor law system and the public health system mark him out as one of the early pioneers of reform who realised that zeal and indignation are not enough and must be accompanied by a scientific and independent study of the facts and of the probable consequences of remedies proposed.

One suggestion for the future I venture to submit to the author. Is it not possible to give more attention to the counties and the large provincial towns and cities? The first three volumes give us a mass of information regarding London and its immediate surroundings but not much about Birmingham, Bristol, Liverpool, Manchester, or Lancashire and Yorkshire.

Dr. Radzinowicz is, in my opinion, fully justifying the expectations created by his first volume. The second and third are again marked by most impressive documentation. What makes them so readable in spite of that is the author’s keen interest in persons. In chapter after chapter we find that the story of progress centres upon some individual or group of individuals. As I wrote in reviewing the first volume the footnotes and appendices are full of valuable material. I am confident that the various organisations whose generous help in this costly enterprise is acknowledged by the author in his Preface to Volume 2 are getting good value for their money in enabling him to make this significant addition to our social and legal history.

McNAIR.

The Law of Real Property. By R. E. MEGARRY, Q.C., M.A., LL.B., of Lincoln’s Inn, Reader in Equity in the Inns of Court, and H. W. R. WADE, M.A., of Lincoln’s Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. [London: Stevens & Sons, Ltd. 1957. lxxxiii and 999 and (index) 33 pp. 63s. net].

THE late Professor Potter in a review written some years ago regretted the failure of modern property lawyers to produce elaborate large-scale treatises as distinct from works of reference. The authors of this book have made it impossible for anything of the kind to be said at the present day. There has probably never

been published any more elaborate and detailed work covering the whole field of real property law. The result is of immense value to all who are concerned with that branch of the law whether as practitioners, teachers or students.

Like the great treatises of the past, from Littleton down to Challis, the book performs two functions. In the first place it provides the student who initially knows nothing of the subject with the material for constructing his own mental picture of the structure and framework of the law. From this point of view the book is admirable. It is so arranged that the beginner using it should get through the initial stages of confusion and despair in the shortest possible time. The historical development of the system is explained with a wealth of learning, but without any tendency to dwell on antiquities except where a knowledge of them is necessary for an understanding of the position at the present day. Legal principles are in general explained with great clarity: the student is neither confused by ambiguities and cloudy expressions nor exposed to the dangerous influence of elaborate metaphors and far-fetched analogies, those standing temptations of the imaginative expositor of property law. Of course the sheer size of the book is such that no undergraduate reading for a degree examination could possibly assimilate all its contents in the time at his disposal, and the discussions of difficult points contained in the text and the footnotes are often far too detailed for him to memorise. But the serious student who is determined to master real property (this book is not designed for others) will find the detail of great value though he cannot hope to remember it all: it will give him some insight into the nature of the problems which a real property lawyer has to solve and the technique appropriate for solving them, and it will prevent him from forming those absurd misconceptions which so often find their way into the mind of the student whose reading covers too narrow a field.

The other function of the book is to help the practitioner, not by giving an encyclopaedic account of the effect of all the decisions and relevant statutory provisions, but by indicating the principal difficulties and problems which arise and giving assistance towards their solution. The very high quality of this aspect of the work is difficult to illustrate in a review, but can hardly be overstated: it is perhaps sufficient to say that the wide learning and formidable analytical and critical powers of both authors are fully displayed throughout the book. The conveyancer who wishes to appreciate these qualities is advised to turn to the sections on remoteness (pp. 205-258) and easements and profits (pp. 709-780), which are full of interest and instruction for the property lawyer: also to the very helpful short discussion of the distinction between mere equities and equitable interests at p. 116.

In short, for the scheme and general quality of the book the reviewer has nothing but praise: he feels that here there is nothing

that could have been better done. Nor is there much opportunity for criticism on points of detail. It is apparent both from the preface and from internal evidence that the utmost care has been taken and great labour expended by both authors in close collaboration: the result affords few openings for the critic. The following comments have, however, occurred to the reviewer and may be worth the consideration of the authors in their quest for perfection when it becomes necessary for them to prepare a second edition.

At p. 71 occur the words "It has been suggested that the Statute *Quia Emptores*, 1290, made it impossible to create determinable fees." The student will naturally read this as referring to all determinable fees, and it might have been as well to point out that the doubt cannot extend to legal determinable fees created by grants to uses, or determinable fees taking effect in equity under trusts, and that the reason the doubt has never been resolved is that the determinable fees met with in practice have almost invariably belonged to one of these two categories. The example of a determinable fee given in the succeeding sentence—the limitation in a marriage settlement to the settlor himself in fee until solemnisation—of course always took effect under the Statute of Uses or under a trust before 1926, and now can only take effect under a trust: the student reading the text might well jump to the conclusion that the doubt about the effect of *Quia Emptores* applies to all fees of this sort, and legitimately wonder why in that case draftsmen have persisted in introducing them into marriage settlements.

At pp. 132–134 it is pointed out that the words in the amended section 7 (1) of the Law of Property Act, 1925, "A fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute" make all fees simple which are defeasible by conditions subsequent (not merely fees simple subject to a provision for re-entry on non-payment of a rentcharge) capable of ranking as legal estates if limited to take effect as such. Then it is said "This creates little difficulty, for in practice all rights of entry except those which secure a legal rentcharge appear to bring the land within the special procedure of the Settled Land Act, 1925." There is surely much to be said against this proposition. If A executes a deed by which Blackacre is expressed to be conveyed to B in fee simple upon condition that B does not marry X, that deed does not appear to constitute a settlement within section 1 of the Settled Land Act, 1925. For if that section is to apply, the land must be "limited in trust." Now it seems clear that the conveyance does not constitute a limitation *in trust*, for the interest taken by B is, having regard to the provisions of section 7 (1) of the Law of Property Act, 1925, a legal estate, and though A's right of entry in the event of a breach of the condition is an equitable one, it is not easy either to see how that fact alone makes the land the subject of a trust,

or to determine who the "trustee" is. And the application of the machinery of the Settled Land Act to a case of this sort presents insuperable difficulties. Surely convenience and logic both point to the conclusion that a direct grant in fee simple subject to any valid condition subsequent is not within section 1 of the Settled Land Act, 1925. At any rate the statement in the text is very likely to confuse a student, and the insertion of a few words explaining the nature of the difficulty would be of great help here.

Another criticism relating to settled land is a small matter of terminology. At p. 142 it is said that settlements of land fall into two classes: strict settlements and trusts for sale, a strict settlement being one in which "the land itself is given to the beneficiaries: for example 'to A for life with remainder to B in fee simple.'" This constitutes clear notice that the authors intend to use the term "strict settlement" as extending to every settlement within the Settled Land Act. No doubt there has been a tendency to give the term this meaning in recent years, but would it not be better to use the term only in the well-established sense of a realty settlement containing elaborate limitations of the kind first devised in the seventeenth century for keeping the land in the settlor's family as long as possible? The authors themselves use "strict settlement" in this way at p. 362: it was so used long before the Settled Land Acts were ever heard of (the statement that a simple disposition in favour of A for life with remainder to B in fee simple is a strict settlement would have seemed absurd to Butler or Preston), and it is surely undesirable to rob the term of its precise meaning by using it sometimes in a novel sense and sometimes in the established sense.

At p. 203 the authors in a wonderfully clear and exhaustive discussion of the Contingent Remainders Act, 1877, mention the doubt whether the Act applied to remainders created otherwise than by grant to uses or devise. It might be worth while to tell the student that the settlements *inter vivos* by which legal contingent remainders were created before 1926 were invariably in the form of grants to uses, so that the doubt never caused any difficulty in practice.

The section on concurrent ownership is perhaps the best academic treatment of this difficult topic ever produced: it faces the numerous difficulties arising out of the statutory provisions as to undivided shares, and it contains a full discussion of the transitional provisions in L. P. A., 1925, 1st Sched., Part IV, which are so inexplicably passed over in other students' books in spite of their importance in conveyancing practice. It is perhaps ungrateful to put forward even a minor criticism of anything so good, but the reviewer cannot help wondering whether the discussion of section 36 of the S. L. A., 1925 (at pp. 395 and 396) will not be found confusing by the student. The authors say that in cases of the type of

Re Cugny's Will Trusts [1931] 1 Ch. 305, where land is limited to A for life with remainder to two or more persons in fee simple as tenants in common, and A dies "the settlement ceases before the first stage of devolution" (*i.e.*, the devolving of the land upon A's personal representatives) "but revives before the second" (*i.e.*, the assent by A's personal representatives in favour of the trustees of the settlement pursuant to section 36). This mysterious doctrine of revival, which does not seem to be supported by the authorities, is not further elucidated and will present an insoluble puzzle to the student. It would perhaps be better either to expand the passage or to rest content with a short statement of the effect of *Re Cugny's Will Trusts*.

At p. 559, where the strange doctrine laid down in *Fay v. Miller, Wilkins & Co.* is discussed, it would be helpful to insert references to the dictum of Harman J. in *Pilkington v. Wood* [1953] Ch. 770 and to Miss Tolson's article in (1953) 17 *Conveyancer* at p. 407.

It would also be useful to have a rather more detailed account of the authorities on whether a refusal of consent to the renewal of a lease is reasonable (see p. 631). There is no mention of the principles enunciated by the Court of Appeal in *Houlder Bros. v. Gibbs* which, as Tucker L.J. pointed out in *Lee v. K. Carter, Ltd.* [1949] 1 K.B. 85, is a decision still binding on that court in spite of the dicta in *Tredegar v. Harwood* [1929] A.C. 72.

Having regard to the size and scope of the book these criticisms are small both in weight and in number, and few as they are it would not be easy to add many others to them. The authors are to be congratulated on producing what is clearly destined to become a standard work.

E. C. RYDER.

Sexual Offences. A Report of the Cambridge Department of Criminal Science. Preface by L. RADZINOWICZ, LL.D. [London: Macmillan & Co., Ltd. 1957. xxvii and 514 and (appendices, tables of cases and statutes) 40 pp. 63s. net.]

THIS inquiry, begun in 1950, is based on about one quarter of the crimes known to the police during one year, 1947, in the fourteen chosen police districts of England and Wales. The aim has been to provide facts which have hitherto been difficult to come by, and to correlate them so as to throw some light "on the many facets of sexual misconduct which seem to have escaped notice or could not be fully appreciated through lack of adequate data."

The report deals with the cases of 2,178 offenders involved or alleged to have been involved in indictable sexual offences. It also examines the records of 914 offenders against whom proceedings were brought for non-indictable sexual offences, and the total number of cases studied amounted to 3,092. The number of

convicted offenders was 1,985, of whom almost half (986) were found guilty of indictable or non-indictable homosexual offences. Heterosexual indictable offences, excluding bigamy, procuration and abduction, accounted for 509 convictions, and indecent exposure (non-indictable) for 490 convictions.

The book is divided into six parts and twenty-three chapters, with four appendices, a Table of Statutes and a Table of Cases. There is no index but the Table of Contents is full and there is a summary at the end of many of the chapters.

Part One deals with trends in sexual crime, the undetected offenders, the detected offenders against whom no proceedings were taken, offenders brought to trial, and medical evidence.

The rate of increase in the number of crimes recorded in the homosexual class has, in recent years, been far greater than in the heterosexual class.

Of the accused persons brought before the courts on charges of sexual offences 12 per cent. were acquitted. In the indictable class the highest rate of acquittals was for rape (47 per cent.). More than eight in ten of the offenders were dealt with at magistrates' courts and the guilt of no less than two in three of the convicted offenders was established by their own admission. Less than 3 per cent. of the convicted offenders appealed against conviction or sentence.

It would appear that the incidence of mental deficiency is rather high among sexual offenders, and nearly one-third of the mental defectives had a record of offences exclusively directed against young children.

Medical evidence was available to the courts, before passing sentence, in respect of one in five of the convicted offenders, and medical reports were most frequently requested by the courts in respect of offenders convicted of indecent assaults or indecent exposure. Most of the medical reports were presented by prison medical officers.

Part Two relates to offenders and their victims, with particular reference to the sex and age of the latter and the effect of the offences on them; the age and other characteristics of convicted offenders; criminal records, and sexual recidivists. The vast majority (82 per cent.) of the victims of indictable sexual offences were children under the age of sixteen years, many of whom were extremely young. Almost 60 per cent. of the victims were involved in relatively minor offences. In the remaining 40 per cent. the gravity of the offences varied considerably. In 40 per cent. of the cases there was no indication of resentment or objection by the victims, and in over 90 per cent. the offences had no notable physical consequences. In the indictable group of convicted offenders drink was recorded as a factor in offences against 6 per cent. of the victims, and the proportion of more serious or aggravated offences was higher among offenders who had been drinking.

Of the convicted offenders 69 per cent. were adults between the ages of twenty-one and fifty. Indecent exposure was not an offence committed principally by old men, for only 5 per cent. of offenders were aged sixty and over. Over 61 per cent. of all convicted offenders were unmarried; in the homosexual class the majority of the adult offenders were single. In more than half of the families of married offenders there was no child or only one child. The majority of young offenders under the age of twenty-one were living at home or with a single parent at the time when they were convicted.

The overwhelming majority of offenders had left school at fourteen, and only eighteen of the total of 1,985 had received university education. Nearly 16 per cent. of the homosexuals were employed as domestic workers, hairdressers, cooks, waiters and barmen, while 5 per cent. were actors, musicians and artists. Three per cent. of all those convicted were found at some time to be mentally defective. In addition, quite a large number of sexual offenders were mentally dull and educationally backward. The facts suggest that sufficient consideration was not always given to the possibility of an offender being mentally defective. A considerable proportion of the mental defectives had been licensed or discharged from institutions when still likely to commit fresh sexual offences.

Of the convicted offenders 83 per cent. had no previous convictions for sexual offences and 81 per cent. of these had no previous convictions of any sort. In the cases studied the youngest offender was nine years of age, while the oldest was almost ninety.

The vast majority of those with previous convictions for non-sexual offences had convictions for offences against property and not against the person. Examination of the records of first sexual offenders revealed the existence of a considerable number of non-sexual recidivists.

Sexual recidivists accounted for 17 per cent. of the total, and the majority of these had only one previous conviction for a sexual offence. Persons convicted of indictable homosexual offences were not only more likely to be sexual recidivists but were also more likely to have had two or more previous convictions for sexual offences (usually involving young victims). The proportion of non-sexual offences among sexual recidivists was greater than among first sexual offenders.

There was no indication that recidivists with three or more previous convictions for such offences progressed from less serious to more serious sexual offences. Only one per cent. of all convicted offenders had five or more previous convictions for sexual offences. Thus, the group of persistent sexual offenders was found to be small. Generally there was a great similarity between the repeated sexual offences.

In Part Three the use of imprisonment, the imposition of fines and probation are examined. One quarter of all offenders brought

to justice were sent to prison, but as many as two in three of those sentenced to imprisonment were detained for short periods not exceeding six months. Only one in ten was given the maximum sentence or an aggregate sentence exceeding two years, although for five of the offences imprisonment for life can be imposed, for three the maximum is ten and for two it is seven years. More than half of those who had committed sexual offences against children, and more than two-thirds of those convicted of offences against females aged sixteen and over, were sentenced to imprisonment. More than half of those sentenced to imprisonment had previous convictions of some sort.

Some 43 per cent. of all sexual offenders brought to justice were fined. For probation and discharge the proportions were 16 per cent. and 12 per cent. respectively. The fine was used much less frequently for offences against females, 23 per cent., than for homosexual offenders. Fines were generally small and in 75 per cent. of cases did not exceed five pounds. The proportion of offenders who, after being fined, were re-convicted of sexual offences during a follow-up period of four years was relatively small, only 12 per cent. The number of re-convictions among sexual recidivists convicted of homosexual offences with other adults, and of indecent exposure, indicates that the fine is of little avail in restraining many of them even from indecent behaviour in public places.

Probation was used much less frequently in the cases of those who had offended against males than against females; 9 per cent. as against 23 per cent. Medical and psychiatric reports were requested for four in ten of the offenders put on probation. The large proportion of medical reports which were made during remands in custody is to be attributed, to a considerable extent, to the lack of facilities for an examination of these offenders outside the prison medical service. Most of the probation orders were made for either one or two years. Seven in ten of the offenders could be described as having normal physical health, while the remainder were either in poor health or were suffering from physical defects.

Of the 317 offenders put on probation only nine had been to grammar schools or technical schools and none to institutes of higher education or to universities. Of those below average (16 per cent.) many were illiterate, some were border-line mental defectives, and a few were later certified and sent to institutions for mental defectives. Their offences were often the result of inability to assess social relations properly, a lack of knowledge of sexual matters, or an inadequate resistance to adverse influences. The vast majority of those who were below average in intelligence had committed offences against very young boys or girls. Medical records indicated that 25 per cent. had some history of mental abnormality or instability, but only 6 per cent. of all sexual

offenders put on probation had been detained in mental hospitals for a considerable period of time.

The proportion who were placed on probation and not re-convicted of any sort of offence, during the follow-up period of four years from the making of the orders, was as high as 70 per cent. The rate of success was higher for offences against females than against males. The results of medical treatment in conjunction with probation for homosexual offenders were "extremely disappointing" and for indecent exposure "hardly satisfactory."

In Part Four after-conduct and criminal records at the end of the follow-up period are examined, with especial reference to the persistent sexual offender. Eighty-five per cent. of the 1,985 offenders dealt with in the survey had no subsequent convictions for sexual offences after a period of four years had elapsed from the date of conviction. The authors suggest that a much longer follow-up might be desirable in order to make a more reliable assessment of those who have been only temporarily restrained. The fact that more than sixteen hundred offenders were not re-convicted of sexual offences cannot be attributed to any extensive use of reformatory treatment.

In all these sections of the report the approach is primarily statistical, with a leavening of illustrative examples. Up to this point the work is, in essence, a sociological and statistical study. In Part Five the approach is changed, for there is a detailed examination of the state of the law, with particular reference to the Sexual Offences Act, 1956. Evidence is dealt with at length and particularly the problem of corroboration, for seven in ten of the victims were under fourteen years of age. Under the heading of "Proposals for Amendment of the Existing Law" the substantive law of the offences, the punishment and treatment of offenders, the jurisdiction of the courts and mode of trial, and evidence, are further examined.

On the treatment of sexual offenders the comment is made that "It must be stated at once that after investigating more than 3,000 cases the Department is no nearer to a constructive recommendation for the general treatment of sexual offenders than it was when it began its enquiries. The most it can do is to refer to some of the findings of fact which emerged and suggest that the problem of treatment of the so-called sexual offender by the courts cannot be easily separated from the vast problem of treatment of offenders generally."

Part Six of the report is again different, for it consists of five most useful summaries and comparisons of the legislation and practice concerning sexual offences in Sweden, Norway, Denmark, Belgium and the United States of America.

The four appendices form, in effect, a statistical summary to the report, with certain additional statistical data and an account of the scope of the inquiry and the records used.

It will be apparent that this is an exhaustive examination of the subject. For those who are not statistically minded it is, in parts, heavy going, and there is also a certain amount of repetition which is, presumably, unavoidable.

The reader may regret the absence of a separate chapter embodying the considered opinions of the authors, but the purpose of the inquiry is to present the facts. This it does admirably.

A. LESLIE BANKS.

Sutton and Shannon on Contracts. Fifth edition. By K. W. WEDDERBURN, M.A., LL.B. [London: Butterworth & Co. (Publishers), Ltd. 1956. civ and 522 and (index) 34 pp. 32s. 6d. net.]

THE main problem facing the new editor of an established textbook, especially when it is the first edition not executed by the authors themselves, is to decide how drastic a form of revision to adopt. Mr. Wedderburn has successfully surmounted this difficulty by adopting a compromise. He has attempted no radical alteration in the structure of the book at this stage, but has introduced much new material for the student who is dissatisfied with a mere statement of general principles. Readers who are acquainted with previous editions of this book will find no change in the characteristic system of articles, in which general principles of law are first stated concisely, then discussed and expanded, and finally illustrated by examples from decided cases. The opportunity has been taken to cut out a good deal of obsolete material, while many sections have been either pruned or expanded in cases where recent developments in the law have necessitated a change of emphasis. Recent decisions of the courts have called for the substantial rewriting of large portions of the text, including those dealing with Agreement, Written Contracts, Mistake, Hire Purchase, Exception Clauses, Privity of Contract, and Discharge under Condition. The new material in these articles has been presented in a clear and stimulating fashion, and the reader is kept well informed of the modern trends in legal thought. Those sections which have not called for any substantial revision have been brought up to date and amply illustrated with examples from recent cases.

The original authors designed the book as a simple exposition of the general principles of the law of contract, suitable for the average law student. Mr. Wedderburn has fully respected their wishes in this respect, while also seeking to make provision for the inquiring student by attempting "to combine an exposition of the simple rules with some indication of the more difficult problems." This innovation is to be welcomed and the present editor is to be congratulated on the stimulating and authoritative manner in which he discusses some of these problems. In this respect, reference must be made to the illuminating articles on certainty in the

formation of contract (at p. 26), equitable waiver (at pp. 63, 355 and 413), the loss of the right of rescission (at p. 198), and exception clauses (at p. 304). The law relating to all of these topics has been greatly modified by recent judicial decisions, and Mr. Wedderburn gives a clear and unbiased exposition of the problems involved and the varied solutions advanced by the courts to deal with these problems. Moreover, the reader who wishes to pursue the subject further will find adequate reference to relevant cases and articles in learned periodicals, and will be amply rewarded by a close study of the footnotes, where the editor introduces many provocative suggestions and observations.

There are, however, two points on which this otherwise excellent edition can be faulted. In the first place, it would seem preferable in an elementary textbook to ground the student in basic principles before discussing the implications raised by those principles. It is, therefore, surprising to find a lengthy treatment of the problem of certainty in contract appearing at a stage when the reader is unacquainted with the basic rules of offer and acceptance. Again, an otherwise admirable treatment of equitable waiver, and of the implications of the *High Trees* decision, is found preceding the section dealing with the doctrine of consideration. Some readers may also prefer to deal with the problems of quasi-contract at a later stage in the book, rather than meet them in Chapter III under the rubric of "Simple Contracts." These difficulties probably arise from the fact that the editor has, in general, retained the original order of the Articles and has consequently been compelled to incorporate new developments in the introductory remarks at the beginning of each chapter. Nevertheless, this tendency to put the cart before the horse may confuse the student, and is a purely technical matter which could easily be remedied in a future edition.

The second criticism relates to a point of substance, and concerns the present treatment of the problem of mistake. The introductory article to this topic (at p. 156) starts with the general proposition that "Mistake may operate so as to negative consent. Such a mistake may be on the part of one party only or of both parties." This statement may tend to mislead the student, especially when he is referred, for authority, to the judgment of Lord Atkin in *Bell v. Lever Bros., Ltd.* It will be remembered that in that case Lord Atkin drew a basic distinction between two types of mistake, one which operated to *negative* consent, and the other which operated to *nullify* consent. This distinction was observed in the previous edition, but for some reason the present editor has thought fit to deal with both types of mistake under the general proposition that mistake operates to negative consent. It may be true that the ultimate effect of both types of mistake will be the same, but this superficial similarity conceals a fundamental difference of principle. In the opinion of the present reviewer, this

distinction is not adequately brought to the attention of the student, who may be further confused by the fact that the treatment of "common mistake" is sandwiched between articles dealing with examples of the other type of mistake. It would be interesting to know the reasons for this basic change from the previous editions of the book, for the problem involved is far from being a matter of mere terminology.

These criticisms do not, however, detract from the essential merits of the new edition. Mr. Wedderburn has effectively blended an authoritative statement of general principles with an attractively critical survey of all the problems arising in the field of contract. The new edition is a book which merits the serious attention of all law students.

J. F. WILSON.

Trial by Jury. By the Hon. SIR PATRICK DEVLIN, one of Her Majesty's Judges in the High Court of Justice. Published under the auspices of the Hamlyn Trust. [London: Stevens & Sons, Ltd. 1956. viii and 165 and (notes) 13 pp. 15s. net.]

SIR Patrick Devlin's Hamlyn Lectures (the eighth in the series) were delivered in November 1956. Dr. Glanville Williams gave the lectures for 1955 and, in presenting his study of the English criminal trial, was hardly enthusiastic about the jury. Sir Patrick Devlin, dealing with the jury in civil as well as criminal cases, emerges as a powerful supporter of the jury system. But, in these four brilliant lectures, there is no attribution of mystical qualities to twelve random individuals in the jury box. Sir Patrick Devlin's jurors are no more of "stern judicial frame of mind from bias free of every kind" than were Gilbert's. The system that Sir Patrick Devlin is supporting is not trial by jury, for there is no such thing, but trial by *judge and jury*. "The reality of trial by jury consists of a combination of judge and jury. That is the historical development. Trial by jury means a compounding of the legal mind with the lay. The prescription for this compound has been one of the greatest achievements of the common law." This is the theme of the lectures, developed with clarity, vigour and frankness in a style which justifies the claim that the lectures are directed to such of the common people as are interested in the way that justice is done, but which cannot conceal the learning and scholarship that lies behind.

As published, the lectures are divided into: the origin of the jury, the composition of the jury, the jury as a judicial tribunal, the control of the jury (two chapters of sixty-five pages in all), and the decline of the jury and its strength. There is an interesting account of the early history of the jury and of qualifications for jury service. There is a discussion of challenges and a comparison with

the American practice. The unanimity rule is considered: "why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable?" Sir Patrick Devlin would not object to a majority verdict in civil cases, subject to safeguards, but in criminal cases he would leave things as they are. "If an institution has been constructed to plan, we may have some confidence in improvements suggested by planners. But the jury, like so many English institutions, has been constructed biologically rather than mechanically. In the fields of legal and political science the English have found the green fingers of gardeners more useful than precision instruments."

Of particular interest and value are the discussions of the control of the jury by the judge in matters of law and evidence, the misleading distinction between fact and law, the difference between any evidence and enough evidence, the effect of unsupportable verdicts, and the sovereign power of acquittal in criminal cases. The functions of judge and jury in relation to libel, construction of documents, implication of terms, reasonableness of covenants in restraint of trade, quantum of damages and remoteness of damage, and the rights, duties and discretions of the judge in summing up, are all considered. The true relationship of judge and jury is suggested in the passage: "the trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict."

The lectures conclude with a discussion of the diminution of trial by jury in civil cases. This is supported by figures, many of which are not available elsewhere. It is made clear that the decline in the use of the jury is not because a jury is refused when asked for; the number of refusals is negligible. But practitioners rarely ask for a jury in cases other than libel and slander and breach of promise, and the proportion of jury trials in civil cases is now only 2 or 3 per cent. of the whole. This may be due in part, it is suggested, to the natural conservatism of solicitors and their managing clerks who tend to stick to the paths with which they are familiar, but the fundamental reason, Sir Patrick Devlin thinks, is the need for predictability in most types of civil litigation. "The fact is that the great bulk of civil litigation now consists of cases about two types of alleged carelessness—that of an employer towards his workmen and that of a motorist towards other users of the road. Whenever cases about carelessness belong to a type, it is inevitable that there should also grow up a typical standard of care; it is not something that can be put into a formula which the jury can be told to apply; it depends upon a knowledge of the sort of approach that is generally made to cases of the type." And so the parties, through their solicitors, prefer the informed mind of

the judge to the fresh mind of the jury. But when predictability is of minor importance—where a man is on trial for his liberty, or his honour or reputation is at stake, or the result is unpredictable anyway because there is going to be “hard swearing on both sides”—then the jury, which it is freely admitted may pay regard to considerations which the strict law requires it to ignore, is in its proper element. The final passages of these lectures are full of good things. One would like to see Sir Patrick Devlin’s replacement of the lady with ample draperies and a pair of scales by an embodiment of Colonel Bogey designed by a sculptor of the modern school.

The lectures open with a disclaimer: “trial by jury is not a subject on which it is possible to say anything very novel or very profound.” They continue with a prophecy that lawyers will certainly find the lectures very elementary. These are, perhaps, the only two demonstrably unsound statements in the book. This is a masterly and powerful contribution to a series that goes from strength to strength.

F. J. ODGERS.

Roman Foundations of Modern Law. By H. F. JOLOWICZ, LL.D., D.C.L., of the Inner Temple, Barrister-at-Law; Regius Professor of Civil Law in the University of Oxford; Fellow of All Souls College, Oxford. [Oxford University Press. 1957. xx, 206 and (index) 11 pp. 35s. net.]

THIS book appears, sadly enough, after the death of the author, the last of many scholarly contributions to the study of Roman law. Fortunately, as we learn from the preface, the manuscript was complete as far as it goes and now comes to be published under the guidance of Professors Lawson and Daube who have verified references in the text and added an index of authorities cited. Yet the work remains fragmentary in the sense that the author intended to survey the Roman legal system as a whole and this volume only carries out the first part of that plan by covering the sources of Law and the bulk of the Law of Persons. Its object is not to give an exposition of Roman law for its own sake, or even primarily for its comparative value, but to describe the system insofar as it forms the basis of European law. To achieve this thoroughly concurrent influences as that of the Canon law have had to be discussed. The result is a very learned compilation, yet none the less readable. The footnotes are full and useful and draw away much that might otherwise clog the flow of the text.

The first part is a series of nine chapters relating to Sources of Law, dealing with such subjects as Legislation, Custom, Equity and analyses of the difference between public and private law and of the Institutional scheme. The ninth chapter, on the effect of

procedure on substantive rights, brilliantly conceived to wind up the first part, leaves the more general considerations of the earlier chapters and introduces the reader first to the details of the law. In this first part the sweep and range of the text is so wide that criticism of detail is hardly feasible. But the statement at p. 15 may be questioned, where it is said of the Roman sources, "nor is there any attempt to distinguish, as Austin for instance does, between 'the end or purpose which determines the lawgiver to make' a statute and the 'intention or purpose *with which* he actually makes it.'" It might here have been apposite to quote the terms of the *scc. Trebellianum* and *Macedonianum* (Bruns, *Fontes*, pp. 202, 203) where the opening words give the cause and motive for the measure and the closing words its general purpose. Also the question put at p. 20 n. 2, may be answered on other lines by reference to English history. The Crown is not generally bound by Acts of Parliament, not because of the maxim *princeps legibus solutus*, but because as a constituent part of the legislature the King cannot, by assenting to an Act, be intended to prejudice himself unless in express terms.

The second part of the book deals with personality in the law and corporate activity; the third part is designated Family Law and here the main emphasis is on marriage and matrimonial property. Unfortunately the author had not completed more than an outline of his treatment of guardianship. The historical influence of Roman law in this last part on family relations cannot be said to have been strong. The Roman concept of *liberum matrimonium* has not survived and it is hardly likely that any amount of secularisation will lead society back to it. Some important principles nevertheless have been received indirectly through Canon law. Also the Roman system of separate property of husband and wife, tempered only by the availability of dower, has hardly made its way against the local customs of Europe. But despite these considerations and the fact that *Patriapotestas* has proved too rigorous for any people other than the Romans (and even the Roman system was in time forced to relax the principle) the author holds our interest to the last page on his own terms, that is, not only to give a comparative study but primarily a historical survey of the Roman foundations on which so much modern law rests.

DAVID YALE.

The United Kingdom. The Development of its Laws and Constitutions. Part 1. *England and Wales, Northern Ireland, The Isle of Man.* Under the General Editorship of GEORGE W. KEETON, M.A., LL.D., and DENNIS LLOYD, M.A., LL.B., with Specialist Contributors. Part 2. *Scotland* by T. D. SMITH, M.A., Member of the Faculty of Advocates in Scotland, of

Gray's Inn, Barrister-at-Law, Professor of Scots Law in the University of Edinburgh; *The Channel Islands* by L. A. SHERIDAN, LL.B., PH.D., of Lincoln's Inn, Barrister-at-Law, Lecturer in Law, Faculty of Law, Queen's University, Belfast. [London: Stevens & Sons, Ltd. 1955. Part 1. xiv and 523 pp. (including Tables and Index); Part 2. xi and 614 pp. (including Appendices, Tables and Indices). £3 3s. net each Part]

It ought perhaps to be made clear that two separate books are under review, though together they constitute Volume One in the now familiar series *The British Commonwealth. The Development of its Laws and Constitutions*. The split is not entirely happy and references must be made with care; thus the "Scottish volume" begins with page 603, the Preface to the "English volume" refers to "two volumes," the dust cover of both books refers to them as Volume 1, Parts 1 and 2, yet each of these Parts is itself divided into Parts. For present purposes, however, the "English volume" and the "Scottish volume" should serve to distinguish the two books.

The former volume presents the reader with an immediate difficulty and that is to determine the audience for whom it was intended. The Preface indicates that the editors did not have in mind an institutional treatise on English law or a volume of modern legal history but rather "a survey of the most important developments in the law and of some of the problems which have arisen as a result of those developments." But it is still not clear whether the intention is to explain those problems and developments to the layman, the student, the English lawyer or his foreign counterpart. Who, for example, is being addressed when we are told (at p. 392) that "in calculating the cost of a university education, account must be taken of the general upkeep of the student and also of the fact that his earning days are postponed." At p. 387 we are informed that "it is obviously a commercial proposition to carry electricity great distances and obviously not one to do so with gas." And when dealing with the cost of litigation, it is thought necessary to explain (at p. 317) that taxation of costs "has nothing to do with the payment of taxes." It is clear that the contributors had an extraordinarily difficult task but it is thought that their task would have been lighter had this initial problem been solved for them. On the whole there will probably be general agreement that the book will be most profitably read by those with some background of English law, for the emphasis is on developments and problems and generally modern ones.

Turning to individual contributions, the introductory chapter on the Nature of Law and the Judicial Process, Chapter 3 on the Constitution and the immediately following chapter on Administrative Law, all of them contributed by Professor Newark, deserve singling out for their brilliant, succinct lucidity; and they are

chapters which the student would greatly profit from reading. The heaviest individual burden is borne by Professor Lloyd, who is responsible not only for a most helpful introductory chapter on Precedent, Legislation and Codification, but for the sterner stuff on Landlord and Tenant, Family Law, Contract, Mercantile Law, Tort, Civil Courts and Procedure, The Law of Evidence and Industrial Law. In these short essays, for such they are, Professor Lloyd maintains a remarkably high and even pitch of writing, summarising with broad yet accurate generalisations and at the same time continually provoking the reader to a reassessment of problems both familiar and unfamiliar. The emphasis here is very much on recent trends and it causes no surprise to see that in the discussion of Mistake, Innocent Misrepresentation and Frustration such faces as *High Trees*, *Solle v. Butcher*, *Leaf v. International Galleries* and *British Movietonews v. London & District Cinemas* should reappear.

Professor Newark and Professor Keeton are the joint contributors of three chapters; the one on Criminal Law contains a useful summary of the general principles of criminal liability—though, curiously enough, there is nothing on the criminal courts. In Chapter 6 they indicate the main developments of the law of property and (in Chapter 11) bring out some of the recent problems in company law.

It is not the fault of the contributor concerned, but the chapter on the Nationalised Industries is the least rewarding part of the book, for here is to be found the horror of "Abbreviations in Capitals." Thus (at p. 386) "Borrowing powers are given to the B.E.A. and E.A.B.s, the B.B.C., A.C., N.C.B., B.T.C., G.C. and G.A.B.s and I.T.A. Reserve funds must be established by the B.E.A., B.B.C., A.C.s, N.C.B., B.T.C., G.A.B.s and I.T.A. and may be established by the E.A.B.s, B.B.C. (for purposes other than those for which they must establish such a fund). . . ." One can almost hear Mr. Sheridan breathe a sigh of relief as he ends his chapter with the words: "There are also private roads, but they can scarcely be called a social service"! Much more useful and interesting are Mr. Sheridan's chapters on Northern Ireland; had they existed some years earlier, the reviewer would have been saved the embarrassment of having to plead ignorance of the existence of Deasy's Act. (He must still plead ignorance of the fact (stated on p. 460) that the leading authority on section 3 of that Act is *Twaddle v. Murphy*!)

Mr. Holland's brief contribution on the Isle of Man is equally interesting; some of us might even be tempted to retire there in view of his assertion (p. 493) that "there are no Bills of Sale in the Isle of Man."

The "Scottish volume" is in many respects quite different from its companion. For one thing it is the first attempt, so far as one can judge, to present an overall picture of the Scottish legal system

and of the principles of Scots law. That task must have been extraordinarily arduous and one must offer sincere congratulations to Professor Smith on this remarkable achievement. The editor expresses the hope that this volume will extend the study of Scots law outside Scotland; it is this purpose which must excuse the apparent impertinence of one unschooled in even the rudiments of Scots law to attempt an appraisal of Professor Smith's work. Let it be said at once therefore that he has thoroughly enjoyed the experience and profited by it, for, as Lord Macmillan once observed, "to learn another system of law is like learning another language. It not only adds to one's knowledge but renders the system one already knows more intelligible and more vivid."

Professor Smith's main purpose is to state principles of modern law—though the author does give us the advantage of a brief historical background to Scots law—and to indicate problems still in need of solution. Certainly he does not hesitate to be controversial; indeed, it is hoped that one may be forgiven for saying that occasionally even a Celt becomes slightly irritated by repeated allusion to the rather ridiculous law from over the border. Neither system gains much benefit from such purple passages as "One may admire the English legal genius, the English way of life and the English as a people, without necessarily believing that the New Jerusalem should have its sole earthly manifestation in England's green and pleasant land, nor that the Common Law is the final embodiment of legal wisdom" (p. 688). Nor were Professor Smith's original views on Error made any clearer by saying (p. 1008) that "the divergent views expressed in and on the case of *Bell v. Lever Bros.* and its *sequellae* do not suggest that upon the topic of mistake the law of England is ripe for export." And Professor Smith is rather rubbing salt in the wound when on three separate occasions (pp. 623, 647 and 649) he tells us (almost in identical words) that "purported variations of the Treaty of Union of 1707 by Act of Parliament may be regarded as ratified by the tacit assent of the people of Scotland." Fortunately the author can display a lightness of touch as well, as where he relates (at p. 708) what must have been the Scottish equivalent of a November 5th party—that in the case of *Niven* "it was held relevant to charge murder on averments that the pannel had fired a small cannon up a lane and killed one of the public, even though no suggestion was made that the pannel had enmity towards any of the persons in the lane."

We repeat, it is all very enjoyable and most profitable; where one may not agree with the author, one is at least compelled to think about the reasons for disagreement.

T. C. THOMAS.

The Lion and the Throne: The Life and Times of Sir Edward Coke, 1552-1634. By CATHERINE DRINKER BOWEN. [London: Hamish Hamilton. 1957. xiv and 517 and (index) 14 pp. 42s. net.]

THIS is a vivid and detailed biography of the greatest of common lawyers. Mrs. Bowen's success in bringing Sir Edward Coke to life for the reader is due very largely to the skill with which the tale of his life is combined with a colourful description of its background. Coke comes to life because Essex, Raleigh, Popham, Ellesmere and the Cecils, as well as Francis Bacon and Lady Hatton, come to life. The physical scene, too, is vividly portrayed, whether it be Norfolk, the House of Commons or Westminster Hall.

The authoress modestly disclaims "the discovery of new material" (p. 480), and no doubt most of her information will be known to the professional historian of the period. Nevertheless, a wealth of material from contemporary sources has been assimilated and its orderly presentation in relation to Sir Edward Coke is new. There is abundant quotation from State papers, private letters and popular ballads, all skilfully woven into the narrative. Such events as Coke's prosecution of Essex, Raleigh and the conspirators in the Gunpowder Plot were dramatic enough in themselves, and here Mrs. Bowen wisely bases herself very largely on the accounts in the series of State Trials. But apt quotation from other sources is interposed. Thus, for example, interest in the trial of Father Garnett, the Jesuit Provincial, for complicity in the Gunpowder Plot, is heightened by a letter sent by Cecil to Coke, the King's Attorney, on the morning of the trial. It directs him to make plain that the plot had begun in Elizabeth's time "before His Majesty's face was seen or he had done anything in government." Coke must remember, too, "to lay Hugh Owen as foul in this as you can" (p. 228). It adds point to some of Coke's remarks at the trial. Allusions, too, are explained which might otherwise escape the reader, such as a particularly sly dig by a confederate of the Earl of Essex at the hurried circumstances of Coke's second marriage (p. 140n.)

Coke's character is treated sympathetically, though a full account is given of his conduct as Attorney-General. Between this conduct and his later life there is at least an apparent contradiction. In her Preface (p. xiii), Mrs. Bowen suggests: "From Elizabeth's Attorney-General to James's Chief Justice is a natural transition. But from state prosecutor to whole-hearted Commons man, defender of free speech and parliamentary privilege, is almost a transmutation." James I may—even then—have been surprised by Coke's conduct in the Commons of 1621 (after all, Coke had curried favour with Buckingham and had been returned from Liskeard as royal nominee, p. 361), but the alliance of common law with Commons was inevitable; and Coke had already as

Chief Justice chosen the common law as against the prerogative. The change, if any, is from Coke the Attorney-General to Coke the Chief Justice. In the text Mrs. Bowen recognises this and seeks a justification. "Coke's change of direction was logical: Stuart England was not Tudor England; a man could with honesty uphold Elizabeth's prerogative and cry down James's" (p. 253). But Coke was even more rigorous as James's Attorney than as Elizabeth's, and it seems too easy to say that "James came to the throne, and for a brief year or two the issue and the antagonists seemed to remain the same: in the Gunpowder trials it was Rome, Spain, a foreign enemy that Coke, Attorney-General, continued to fight. Yet by the year 1607, James had revealed himself to those with eyes to see" (p. 253). Rather, Coke changed because his office changed. His subsequent conduct was not so much "defence against such antagonists as Lord Chancellor Ellesmere, Archbishop Bancroft and Sir Francis Bacon" (p. 266) as vigorous aggression against all rivals to the common law. The Court of Admiralty, which Mrs. Bowen does not consider, was hardly a threat to English liberty.

The portraits of Coke's contemporaries in the law are good, though the lawyer may feel that Ellesmere has not been given his full due. He may have been irascible, a bitter enemy of Coke and a staunch supporter of the prerogative, but he is one of the great figures in the history of Equity and he has as good a claim as Bacon to be described as "Chancery's greatest champion" (p. 254). Bacon himself was bound to come out badly; but not, perhaps, as badly as he has fared. His less creditable letters are quoted at length (Coke was fortunate in leaving almost none) and occasionally the charges brought against him are rather far-fetched. Is there any reason to suggest that Bacon might have prompted the offer which Montague made for Coke's collar of SS when he succeeded him as Chief Justice of the King's Bench (p. 374)? One feels that some of Coke's actions (*e.g.*, p. 22: his convenient illness as Speaker of the House of Commons on the day that four members were sent to prison) would have incurred suspicion had they been Bacon's. Coke's contemporaries outside the law seem to be portrayed fairly enough, especially James; is there any evidence, though, that Lord Admiral Nottingham, who had commanded the English fleet against the Armada, was a Catholic who should have had qualms about taking the Oath of Allegiance to James (p. 299)?

The technicalities of the law and the legal profession have been mastered very well indeed within the period, though a few errors have crept in. Thus the prisoner's right to challenge the jury is not correctly stated (p. 55), nor is Elizabeth's practice in conferring the titles of Keeper and Chancellor (p. 16n.). Richard Mylward (an "attorney"?) was not punished so picturesquely by Egerton because he "appeared in Chancery with a brief one hundred and twenty pages long" (p. 95), but because he drew a replication of that

length. Mrs. Bowen was unlucky to choose *Shelley's* case for her one incursion into real property; both the account of the dispute and the statement of the Rule are singularly unfortunate (p. 63): but she can take comfort in the fact that she is not the only one to stumble over this case.

The period was of great importance in the growth of the Attorney-General's position in the profession, and Mrs. Bowen fails to realise that the medieval supremacy of the Serjeants was being lost during those years. Thus she suggests that the latter's rank was one which in 1593 "Coke coveted and would not attain for thirteen years" (p. 16), and comments on his appointment as Chief Justice that "the wonder was that so distinguished a barrister had never been created Serjeant" (p. 240). The explanation is simply that one could not be both Serjeant and Attorney-General, and while "Serjeant was first step towards a judgeship," the Attorney's post was already first step towards a Chief Justiceship. It was a post which incurred a certain suspicion from the Commons; so in 1614 Bacon was not the last Attorney-General to sit in the Commons (p. 301), but the first.

Outside the period some of the statements also need correction, but again mainly in detail. Fleta has been made a judge (p. 52), and at first sight another legal author, John Reeves, appears to have been similarly elevated. A statement is attributed to "Lord Justice Reeves in 1787" (p. 442); but in the Source References he becomes "Chief Justice Reeves" (p. 515), which is a clue to the reader that the person intended is Thomas Reeve, C.J.C.P., who died fifty years earlier. Similarly Coke's well-known dictum in *Bonham's* case on the supremacy of the common law was approved by Chief Justice Holt, not in 1688 (p. 273), when he was not yet a judge, but in 1702. In the ordeal of hot coals, the man whose hand "acquired burns that would heal in the requisite number of days" (p. 467) was surely innocent, not guilty? The description of Courts of the Archbishops as held at "Bow Street church" (p. 255) may perhaps be forgiven an American; so, too, a statement of the distance of Newmarket from London (p. 388).

These errors may easily be eliminated in a second edition; they are chiefly irritating because of the difficulty of finding the appropriate references. There are no marks in the text to indicate that a reference is given, and the reader has to work back from the pages and lines mentioned in the list of Source References. This may avoid interruption of the text, but necessitates the laborious and repeated counting of lines. The book is, nevertheless, one which lawyers especially will enjoy. Interest is never allowed to flag, and the many titbits of information about the legal profession will be readily welcomed.

M. J. PRICHARD.

Law and Structures of Social Action. By KENNETH S. CARLSTON, Professor of Law at the University of Illinois. Published under the auspices of The London Institute of World Affairs. [London: Stevens & Sons, Ltd. 1956. xii and 273 and (bibliography) 11 and (index) 4 pp. 35s. net.]

THE modern jurist, like his Roman counterpart, conceptualises the units of law as individual and somewhat isolated and independent persons having relationships with other similar individuals. The task of the law is conceived as the regulation of these relationships. Groups, so far as possible, are treated as if they were individuals. "Personality" is attributed both to States and Corporations—which means that legal institutions, evolved for the relations of individuals, must somehow be fitted to the relationships of these groups. It is Professor Carlston's thesis that this way of thinking ignores the facts that neither individual nor State can be independent in the modern world, that the group is now the basic unit of our social life, and that the economic organisation has become the fundamental reality of our industrial civilisation. Thus the vital problem of the power of the organisations—the relationship of State to organisation and organisation to individual—gets insufficient attention. So, too, the problem of the relationships between organisations which are world-wide and are served by no adequate legal system. These problems cannot be properly dealt with by the old ways of thinking. Paradoxically the traditional mentality also obscures the fact that the law applying to groups can only be a law for individuals which takes into account and provides for their organisation. What is needed is some fundamental re-adjustments in the concepts employed in thinking with regard to groups, based on a more adequate knowledge of the realities of social life and social structures. For instance it is difficult for the contemporary lawyer trained in the dichotomy of Municipal and International Law, to conceive a Law Merchant, neither municipal law nor a law between States, save as an historical phenomenon. And yet it may be the prototype of the system for which international economic enterprise, and indeed all group organisation, is seeking: a law worked out in the actual practices of a group organised around a common end, and refined by the arbitral decisions (more legislative than judicial in character) of well informed experts in the special business of that community.

Professor Carlston believes in free scientific inquiry and has faith that an increased understanding of society and social processes will result in an improvement in legal institutions. But he admits that the findings of social scientists are so far insufficient to point the way to the solution of the problems which the world faces. This tempts one to ask whether Professor Carlston, who has obviously read widely in the current literature of the social sciences, has done more than use the results of recent analyses of society to

state old problems in a new jargon. And does it really help to suggest that we may finally be able to make international law a real force when international jurists are not only trained in law and diplomacy but are "conversant with the philosophy of law and ethics, comparative law, international economics, history, social psychology and anthropology, among others"? A critical attitude is not soothed by repetitions caused by the imperfect welding together of previously published articles and a certain lack of direction in the discussion. The reviewer was uncertain what it was all about until he was informed, on the last page but three, that it was a study of some of the many aspects of authority and power in modern society. Yet there is a main thesis, which is valid and important. New solutions are brought nearer when old problems are restated in terms resulting from a more realistic analysis. The lawyer is given an insight into recent work, especially that of Talcott Parsons, on the structure of society, and an account of aspects of international and industrial relations, particularly of the working of the Anti-Trust legislation in the U.S.A., which are unfamiliar to the non-specialist. Professor Carlston's thought is stimulating and, on the whole, constructive. Not least convincing is his plea for further research into the actual practice of economic organisations as a necessary basis for the legal control of their power in the common interest.

B. E. KING.

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